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Article

Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment

by
GARY MINDA*

In this Article, I am interested in exploring how an otherwise forbidden version of age and pension discrimination in employment can be practiced by firms which have implemented downsizing¹ or reduction-in-force (RIF)² strategies. My goal will be to explain how this form of discrimination can be perpetuated in the name of cost containment policies. I will refer to this type of illegal age discrimination as "opportunistic downsizing." Downsizing is "opportunistic" when-

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1. The word "downsize" first appeared during the oil crisis of the early 1970s, when automobile executives used "downsizing" to describe the move toward the design of smaller, gas-efficient automobiles. See Louis Uchitelle & N.R. Kleinfeld, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A1, A14. When applied to workers, the word "downsize" has come to signify reduced expectations and reduced employment opportunity. In the labor relations offices of corporate America, downsizing has become a euphemism to soften the hard edge of words like "fired," "dismissed," and "laid off." In the corporate-speak of the 1990s, employees "are 'downsized,' 'separated,' 'severed,' 'unassigned.'" [Employees] are told that their jobs 'are not going forward.'" *Id.* In board rooms and chief executive officer (CEO) offices of corporate America, downsizing is a word that summarizes a host of business survival strategies designed to save the corporation from death in the global market place. For most American workers, the word symbolizes the permanent loss of a career job. In the print media, the word "downsize" is used to characterize a fundamental transformation in the workplace; changes which rival those of the Industrial Revolution of the nineteenth century.

2. RIF has a euphemistic quality similar to downsizing, and has similarly been used to mean a reduction in the number of employees in a particular employer's work force for economic reasons. See Lisa Imbrogno, *Can You Have Your Cake and Eat It Too? Ratification of Releases of ADEA Claims*, 20 FORDHAM URB. L. J. 311, 326 n.104 (1993).

ever it is implemented to exploit the vulnerable position of a late-career employee who cannot easily leave the relationship due to factors such as job-specific training which is not transferable to other potential employers, employment and pension benefits linked to seniority, and familial and community ties.³ These factors represent the "sunk costs" of the late-career employee in his/her relationship with the employer, and make older workers uniquely vulnerable to unfair treatment by their employers.⁴

Late-career employees nearing retirement will be especially vulnerable since they stand to lose valuable retirement benefits if they are discharged prior to vesting. The employer, on the other hand, will have an incentive to downsize expensive late-career employees and replace them, if possible, with less expensive younger workers who are many years away from achieving entitlement to valuable employment and retirement benefits. I will argue that the practice of opportunistic downsizing unfairly breaches the trust of long-term employees and should be considered illegal discrimination in employment.

Under the Age Discrimination in Employment Act (ADEA),⁵ Congress has attempted to protect older workers who find themselves "disadvantaged [because of their age] in their efforts to retain employment and especially to regain employment when displaced from jobs."⁶ ADEA protects workers over the age of forty from discharges and other employer actions that are based upon stereotypes associ-

3. I draw from Professor Stewart J. Schwab's discussion of the economics of employer opportunism in career employment. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 15-28 (1993). Professor Schwab's analysis of employer opportunism in career employment develops arguments drawn from the economic study of long term relational contracts. See generally Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

4. In the absence of detailed enforceable contracts that regulate behavior, parties to a long-term relationship become vulnerable to opportunism. This will occur whenever one party to the relationship has incurred "sunk costs" in the relation which render voluntary termination by that party "costly." In such a case, the non-vulnerable party may have an economic interest in exploiting the other party's vulnerability by forcing that party to accept unfavorable terms. Professor Schwab argues that late-career employees face the greatest danger of opportunistic firings. Schwab, *supra* note 3, at 43. The reason for this is that "the general self-interest check on arbitrary firings does not exist; firing such a worker does not hurt the employer but is instead in its immediate economic interest." *Id.* at 19.

5. 29 U.S.C. §§ 621-634 (1982).

6. 29 U.S.C. § 621(a) (stating the legislative purpose of ADEA). The legislative purpose set out by Congress when it enacted ADEA provides:

The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to . . . regain employment when displaced from jobs;

ated with the age of the worker and motivated by ignorance, viciousness, or irrationality. In recognizing a form of unlawful "ageism," which is analogous to, but not the same as sexism or racism,⁷ Congress has sought to prohibit forms of employer behavior that have systematically undervalued the worth of older people in the workplace.⁸

A late-career employee nearing retirement may also lose valuable retirement benefits if he or she is terminated before such benefits vest. Such an employee may allege that downsizing was motivated by an intent to discriminate in retaliation for the future exercise of rights under a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA).⁹ Section 510 of ERISA prohibits this form of discrimination in order to protect pension benefits of ERISA-regulated plans.¹⁰ Hence, for those late-career employees who are terminated prior to the vesting of their pension benefits, there is also the possibility of a pension discrimination claim under ERISA.¹¹

Opportunistic downsizing is a unique form of disparate treatment based on age, which conflicts with the congressional purpose underlying both ADEA and ERISA, because older workers are particularly vulnerable. I will argue that opportunistic downsizing violates ADEA when the employer's decision to downsize older late-career workers is motivated by the larger salaries and benefits such workers earn due to

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

Id.

7. According to Chief Judge Richard A. Posner, the legislative justification for ADEA was based on the view that "people over 40 are subject to a form of prejudice, 'ageism' that is analogous to racism and sexism." RICHARD A. POSNER, *AGING AND OLD AGE* 320 (1996).

8. Posner argues that the only plausible basis for the form of prejudice known as ageism consists "of attributing to all people of a particular age the characteristics of the average person of that age." POSNER, *supra* note 7, at 322. See also *infra* notes 148-61 and accompanying text.

9. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 11, 12, 15, 18, 22, 26, 29, 31, 42, and 45 U.S.C.).

10. 29 U.S.C. § 1140 (1988). This section makes it unlawful:

For any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

Id.

11. As Justice O'Connor has noted, the Supreme Court has never ruled out the possibility of "dual liability under ERISA and ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993).

seniority. Similarly, I will argue that opportunistic downsizing should be found to be violative of ERISA whenever the employer's decision to lay off a late-career employee is motivated by a decision to save money by preventing his or her pension benefits from vesting.

I will also attempt to explain how anti-discrimination legislation might better address contemporary problems of age and pension discrimination in the workplace of the 1990s. In doing so, I hope to respond to the criticism of politically conservative legal scholars who have argued that age discrimination legislation can no longer be justified in light of legitimate business reasons for the practices that ADEA rendered illegal. Contrary to those who have argued that ADEA is "mischievous" or a "misbegotten venture,"¹² this Article asserts that ADEA's failure is the direct result of judicial interpretations of statutory restrictions which have failed to respond to the way age discrimination actually operates in the era of downsizing. What is needed is not less regulation, but rather, more informed understanding of how age discrimination has been perpetuated by business strategies designed to cut labor costs. Instead of "downsizing" ADEA, as conservative legal scholars have recently suggested, I will propose new judicial standards for strengthening the existing provisions of age discrimination law in order to render the law more responsive to the plight of older workers.

Part I will describe the current plight of older workers who continue to struggle to survive the wave of "restructuring," "outsourcing," and "lean manufacturing" strategies that have led to RIF and downsizing in the workplace during the early 1990s.¹³ In this part, I will attempt to explain why downsizing/RIF has had the greatest impact on older workers. Part II then considers the current state of the age

12. POSNER, *supra* note 7, at 361; RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 444, 448 (1992). Professor Epstein argues that ADEA is "more mischievous than the anti-discrimination statutes governing race or sex because it imposes the largest deviation between the contracts that would emerge in an unregulated competitive market and those that emerge under statutory restriction." *Id.* at 448. Posner has, in turn, accepted Epstein's indictment of ADEA in arguing that ADEA is a "particularly misbegotten venture in tilting at the windmills of ageism [Posner's term for age discrimination]." POSNER, *supra* note 7, at 361.

13. I focus on the early 1990s because that is when an enormous wave of downsizings began in corporate America. See Uchitelle & Kleinfeld, *supra* note 1, at A1. By the mid-1990s, there was improvement on the job front. See Judith H. Dobrzynski, *The New Jobs: A Growing Number Are Good Ones*, N.Y. TIMES, July 21, 1996, § 3, at 1 (reporting that since 1995, the percentage of new jobs that pay above-average wages was double what it was in 1992, when the nation was just starting to recover from a recession). It remains to be determined if the early 1990s wave of downsizings has peaked or dissipated. See *infra* note 14.

discrimination law in the context of the downsizings of the early 1990s. As Part II will show, age discrimination law has become infused with competitive economic rationales which have largely immunized downsizing from age discrimination regulation. Part III will then explain how prevailing judicial attitudes about age discrimination law have prevented the legal system from responding to the problem of opportunistic downsizing. In Part IV, I will examine the implications of opportunistic downsizing of late-career employees in relation to ERISA's pension discrimination provision. In Part V, I will argue the case for bringing opportunistic downsizing within the reach of age and pension discrimination legislation. Finally, in the conclusion, I will explore the consequences of what may happen if opportunistic downsizing is allowed to go unchecked by the law. I conclude that opportunistic downsizing will contribute to both the pending retirement crisis and will further advance the slow death of the American work ethic which has heretofore sustained America's standard of living.

I. Downsizing and the Older Worker

We live in an age of widespread economic uncertainty. No one disputes that the past two decades have been cruel to many industrial workers, skilled and unskilled alike.¹⁴ Real wages have failed to in-

14. See UNITED STATES CONGRESS, CONGRESSIONAL BUDGET OFFICE STUDY: DISPLACED WORKER TRENDS IN THE 1980S AND IMPLICATIONS FOR THE FUTURE (Feb. 1993) (reporting that "[e]ach year between 1981 and 1990, an average of almost 2 million workers lost full-time jobs and were not recalled by their former employers"). See also THE DOWNSIZING OF AMERICA (New York Times ed., 1996); Peter Cappelli, *Rethinking Employment*, 33 BRIT. J. INDUS. REL. 563, 576-80 (1995). Recently in the United States, however, there has been disagreement concerning the significance to be attached to the magnitude of corporate downsizing in the economy, and the policy consequences of the downsizing numbers. Compare, e.g., Simon Head, *The New, Ruthless Economy*, 43 N.Y. REV. BOOKS, Feb. 29, 1996, with Paul Krugman, *Down-sizing Downsizing*, SLATE, June 24, 1996 (available at: <http://www.slate.com/Dismal/96-06-24/dismal.asp>). Krugman, an economist at Stanford, in a recent comment on the internet claimed that the April 1996 Report of the Council of Economic Advisers suggested that "[w]orkers are not doing as badly as recent headlines might suggest." Krugman, *Down-sizing Downsizing*, *supra*. See also John Cassidy, *All Worked Up: Is Downsizing Really News or Is It Just Business as Usual?*, NEW YORKER, Apr. 22, 1996, at 22 (arguing that the *New York Times* report should be taken "with a grain of salt"). But see *infra* notes 19-25, 40-44 and accompanying text. See also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKER DISPLACEMENT DURING THE MID-1990s (Aug. 22, 1996) (most recent job displacement survey reporting job displacement due to downsizing and layoffs remains high despite drop in unemployment rates). More recently, the Labor Department's Bureau of Labor Statistics has acknowledged that its August 1996 job displacement survey was drawn from a survey with a lower response rate which should reveal a higher level of job displacement for the 1993-95 pe-

crease appreciably during the mild economic recovery experienced between 1990 and 1995.¹⁵ Productivity and stock market indices have shown healthy growth, while median family incomes have remained stagnant between the early 1970s and the early 1990s, and income inequality has widened between the middle and upper classes of society.¹⁶ Increases in real wages have failed to keep pace with reported increases in productivity indicating a decline in the standard of living for many American workers.¹⁷ Growing income inequality has given rise to serious concerns that American society is itself at risk.¹⁸ The inability of the industrial sector to generate new high paying jobs, coupled with the increasing competitive demands for cutting costs to meet the "leaner" competitors in the global market place have squeezed American workers where it hurts the most—jobs and salaries.

A. Downsizing of Aging Workers During the Early 1990s

Department of Labor statistics show that since 1979, forty-three million jobs were eliminated from the American economy, and sixty-five percent of those workers who lost their jobs have been forced to

riod. See *BLS Correcting Displacement Worker Data*, 153 Lab. Rel. Rep. (BNA) 283 (Oct. 28, 1996). The August 1996 BLS Job Displacement Survey showed that the number of long-term U.S. workers who lost their jobs between January 1993 and December 1995 was still substantial—3.8 million. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS—WORKER DISPLACEMENT DURING THE MID-1990s (Aug. 22, 1996).

Simon Head, a correspondent for the *Financial Times*, writes that despite all the good news of productivity and job growth, there has been a steady downward trend in the living standard for most families since the early 1970s. Head, *New Ruthless Economy*, *supra*, at 47. Anyone who denies the potential nightmare of downsizing should study Western Europe today. See John Tagliabue, *In Europe, a Wave of Layoffs Stuns White-Collar Workers*, N.Y. TIMES, June 20, 1996, at A1, C1. The unemployment figures in Western Europe are startling. In France, average unemployment is over 11%; in Germany it is approaching 10%. Ethan B. Kapstein, *Workers and the World Economy*, FOREIGN AFF., May/June 1996, at 22. As Ethan B. Kapstein has recently noted:

The Europeans have created a lost generation of workers and are now suffering for it in terms of increased crime, drug abuse, violence against immigrants, and the increasing popularity of extremist political groups. In this context, it is sobering to realize that Germany's current level of four million unemployed is the highest it has been since the early 1930s.

Id. Whether one agrees with optimists such as Krugman, or pessimists such as Head, there is no serious disagreement that downsizing has affected older workers more than any other group. See *infra* notes 40-44 and accompanying text.

15. Head, *supra* note 14, at 47.

16. *Id.*

17. *Id.*

18. Alan Greenspan admonished Congress in July 1995 that the growing income inequality in the United States could become a "major threat to our society." *Id.*

accept lower-paying, less-skilled work.¹⁹ A recent, highly-publicized *New York Times* "special report" on downsizing revealed that "[r]oughly 50 percent more people, about 3 million, are affected by layoffs each year than the 2 million victims of violent crimes (reported murders, rapes, robberies, and aggravated assaults)."²⁰ A February 1996 *Newsweek* cover story entitled *Corporate Killers*, in turn, revealed how some of the largest Fortune 500 corporations have recently downsized thousands of workers, while rewarding their CEOs with enormous salaries.²¹ The *Newsweek* story estimates that in the last five years, 370,000 jobs were eliminated by major corporations seeking to cut labor costs.²²

Sensational stories in the media do not necessarily provide evidence of the actual downsizing trends in the economy, since they are not based on representative sampling and empirical verification. However, studies of the American economy have confirmed the media's perception of decreasing job stability caused by downsizing, RIF, and restructuring. A study conducted by Kenneth A. Swinnerton and Howard Wial presented empirical evidence of declining job stability in

19. These statistics collected by the Department of Labor's surveys on job displacement of adults age 20 and over, conducted every two years, were consolidated and analyzed under a moving-average technique by the *New York Times*. Uchitelle & Kleinfeld, *supra* note 1, at A15. See also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS—WORKER DISPLACEMENT DURING THE MID-1990s (Aug. 22, 1996). The Labor Department statistics estimated that 36 million jobs had been eliminated between 1979 and 1993, but the *New York Times* analysis, compensating for recall accuracy, overlapping surveys and projections based on past trends and annual figures of unemployment and the labor force, put the number at 43 million through 1995. *Id.*

20. Uchitelle & Kleinfeld, *supra* note 1, at A1. The *New York Times* reports in graphic detail why many women, minorities, and older Americans, the groups most affected by downsizing, have lost ground financially and are rightfully fearful of the future. *Id.* at 34.

21. See Allan Sloan, *Corporate Killers: Wall Street Loves Layoffs, But the Public Is Scared as Hell. Is There a Better Way?*, NEWSWEEK, Feb. 26, 1996, at 44.

22. See *id.* Sloan reveals how CEOs earning record salaries with some of the largest corporations in America, have downsized thousands of jobs. For example, Michael Miles, former CEO of Philip Morris earned a salary of \$1,000,000 at the time his corporation downsized 14,000 jobs; Frank Shrontz, CEO of Boeing earned a salary of \$1,420,935 at the time his corporation downsized 28,000 jobs; and William Ferguson, former CEO of Nynex earned a salary of \$800,000 at the time his corporation downsized 16,800 jobs. *Id.* at 47. Not everyone finds these statistics to be especially alarming. For example, Paul Krugman, an economics professor at Stanford, has reported in his monthly Web column, *The Dismal Scientist*, that "the impact of corporate downsizing has been greatly exaggerated." See Krugman, *supra* note 14. Krugman states that the 370,000 lost jobs reported in the *Newsweek* article, Sloan, *supra* note 21, at 44, is but "a tiny blip in the number of workers who lose or change jobs every year, even in the healthiest economy." *Id.* This equanimous view offers cold comfort to those 370,000 "downsized" employees who lost their livelihood.

the U.S. economy since the late 1980s.²³ In their study, Swinnerton and Wial concluded that "if the pattern of the late 1980s persists, workers who have stable, long-term jobs will make up an increasingly exclusive club."²⁴ More recently, a consulting firm estimated that based on the announced layoffs published in the media, 131,209 workers would be laid off in the first quarter of 1996.²⁵ While these studies may not be conclusive, they do provide support for the views expressed in the media.

Although downsizing may not affect all workers, older workers as a group are particularly vulnerable. The job displacement rates for older workers are higher than average, considering the length of time between jobs as well as the wage loss due to unemployment. According to the April 1996 Report of the Council of Economic Advisers and U.S. Department of Labor, the displacement rates for older white-collar and better-educated workers has increased.²⁶ This change in the incidence of job displacement for older white-collar workers is probably the chief reason for the heightened anxiety about job loss reported in the media.

For older workers, anxiety about job loss has a real factual basis. According to a study by Ann Huff Stevens of Rutgers University and the National Bureau of Economic Research, wage loss resulting from displacement is persistent even after reemployment at another job.²⁷ Stevens states that "[s]ix or more years after displacement, a displaced worker's earnings remain roughly 10 percent below what they [sic] could have otherwise expected to earn."²⁸ Moreover, she notes that "[r]oughly a quarter of those displaced during 1991 and 1992 had either stopped searching for work or had not yet found work by the

23. Kenneth A. Swinnerton & Howard Wial, *Is Job Stability Declining in the U.S. Economy?*, 48 INDUS. & LAB. REL. REV. 293 (1996).

24. *Id.* at 304. These results, however have been contested by other economists. See Francis X. Diebold et al., *Comment on Kenneth A. Swinnerton and Howard Wial, "Is Job Stability Declining in the U.S. Economy?"*, 49 INDUS. & LAB. REL. REV. 348 (1996). Swinnerton and Wial have shown that these criticisms are incorrect in a subsequent reply comment. See Kenneth A. Swinnerton & Howard Wial, *Is Job Stability Declining in the U.S. Economy? Reply to Diebold, Neumark, and Polsky*, 49 INDUS. & LAB. REL. REV. 352 (1996).

25. See *U.S. Growth Slowing; '95 Productivity Up a Mere 1.1%*, DALLAS MORNING NEWS, Mar. 7, 1996, at 1D (the consulting firm Challenger, Gray & Christmas conducted the survey).

26. See COUNCIL OF ECONOMIC ADVISORS & U.S. DEP'T OF LABOR, *JOB CREATION AND EMPLOYMENT OPPORTUNITIES: THE UNITED STATES LABOR MARKET*, 1 (Apr. 1996) [hereinafter REPORT].

27. See *id.* (reporting the Stevens study).

28. *Id.*

time they were surveyed in February, 1994.”²⁹ The cost of losing a job in today’s economy is thus both significant and persistent for older workers who have a higher displacement rate. For many of these older displaced workers, a good job with promise of long-term job security is a thing of the past.

It is true that the most recent economic data on jobs and wages have shown some signs of improvement, but it is far from clear what this may mean for older workers who have been downsized and are still attempting to recover from long-term displacement.³⁰ It is uncertain, for example, whether the current improvement in the job market means that the downsizing trend has peaked. For one thing, the mild economic recovery occurring since 1994 has not been robust even though unemployment has remained low and inflation relatively constant. When one looks to Western Europe where the unemployment rates are “frightening,”³¹ one wonders whether American workers will be facing yet another round of downsizing in the immediate future. In Europe, downsizing has caused many white collar workers in their fifties to take early-retirement packages which American workers would envy.³² As businesses in the global marketplaces continue to streamline and cut costs, global competition will continue to put pressure on American firms to downsize further, potentially precipitating a new round of job cuts.

On the other hand, the April 1996 Report by the Council of Economic Advisors and the U.S. Department of Labor indicates that non-farm employment grew by 8.5 million (7.8 percent) between January 1993 and March 1996.³³ Private-sector payrolls were up by 8.7 percent for the period, and unemployment had fallen from over 7 percent in January 1993, to 5.6 percent in March 1996.³⁴ The Bureau of Labor Statistics projects that the labor force should grow by approximately 1.1 percent annually between 1994 and 2005 if current demographic

29. *Id.*

30. *But see* Judith H. Dobrzynski, *supra* note 13, at 10 (reporting that growth in new jobs has enabled downsized older employees to obtain new employment at above-average wages).

31. Kapstein, *supra* note 14, at 22.

32. *See* John Tagliabue, *In Europe, a Wave of Layoffs Stuns White-Collar Workers*, N.Y. TIMES, June 20, 1996, at A1.

33. *See* REPORT, *supra* note 26, at 23. In late July 1996, however, the media was reporting that job growth had slowed somewhat, suggesting that the mild recovery on the job front was weak. *See* Richard W. Stevenson, *Growth in Jobs Slowed in July, Breaking Trend*, N.Y. TIMES, Aug. 3, 1996, at A37.

34. *See* REPORT, *supra* note 26, at 23.

trends remain unchanged.³⁵ The Report concluded on an optimistic note: "The news is encouraging: employment has grown disproportionately in the industry/occupation job categories paying above median wages."³⁶ This was good news for President Clinton; he could announce on the eve of the election that during his administration, "[t]he United States has experienced faster employment growth than any [of the] other G-7 countries."³⁷

One must, of course, take such self-serving campaign statements with a grain of salt.³⁸ The good news contained in the April 1996 Report of the Council of Economic Advisors was in fact tempered by some rather sobering facts for older workers, which the President and his economic advisors downplayed in the pre-election media. The Displaced Worker Survey,³⁹ conducted by the Bureau of Labor Statistics (BLS), and analyzed in the Council of Economic Advisors' Report, provides the basis for this conclusion.⁴⁰ According to BLS's Displaced Worker Survey, conducted in February 1994, there has been

35. See *id.*

36. See *id.*

37. *Id.* The announcement of 8.5 million new jobs created since 1993 cannot fully explain away other sobering trends such as the fact that more Americans have been laid off since 1993 than in any previous three-year period since the government started counting in 1979, and the fact that workers' salaries have remained stagnant for the past 20 years. See Alan Downs, *The Wages of Downsizing*, MOTHER JONES NEWS WIRE (July/Aug. 1996) (available at: http://www.mojones.com/mother_jones/JA96/downs.html).

38. This partisan spin was chronicled in the *New York Times*: "As Republicans ready an attack on President Clinton's economic record, Democrats are working to offset widespread anxiety among workers over layoffs and stagnant wages by arguing that the worst days of the downsizing era are over." Louis Uchitelle, *President's Theme: Layoffs Fall and Wages Rise*, N.Y. TIMES, July 27, 1996, at A8. Uchitelle reported that most economists argue that "a far more vigorous expansion than the present one is needed to raise wages significantly and minimize layoffs." *Id.* Without a doubt, one of the central challenges for President Clinton will be "to come up with a convincing 'narrative' that explains why Americans are feeling so insecure in the first place." Elizabeth Kolbert & Adam Clymer, *The Politics of Layoffs: In Search of a Message*, N.Y. TIMES, Mar. 8, 1996, at A1, A12.

39. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 1994 DISPLACED WORKER SURVEY (Feb. 1994).

40. See REPORT, *supra* note 26. The Displaced Worker Survey conducted by BLS is conducted only once every two years, and the most recent data then available was from the 1994 survey, which covered the 1991-92 period. *Id.* More recently, the BLS Worker Displacement Survey issued on August 22, 1996 covering the period from January 1993 through December 1995 reported that a total of 3.8 million additional "long-tenured" workers had been displaced for that period. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKER DISPLACEMENT DURING THE MID-1990s 1 (Aug. 22, 1996). The 1996 BLS Survey revealed that workers in their prime working years, ages 25 through 54, continued to represent the majority of those downsized in the last two years, 78% of the total, and one percentage point higher from the last survey. See *id.* at Table 8. The August 1996 data may have actually underestimated the level of job displacement in the 1993-95 period. See BLS *Correcting Displacement Worker Data*, *supra* note 14, at 283.

a "fundamental change in the *incidence* of job displacement of workers."⁴¹

Table I summarizes the displacement rates, defined as the number of workers displaced per one hundred employed, for the two recessionary periods: 1981-82 and 1991-92. A comparison of the aggregate displacement rates for different age groups of nonagricultural workers shows that older workers in the age category of fifty-five and over have indeed experienced an increase in the incidence of displacement which warranted the Advisors' announcement of a "fundamental change" in the displacement rates for older workers. Table I shows that older, white-collar workers were comparatively more at risk of displacement in 1991-92 than during the previous recessionary period of 1981-82.

Table I
Changing Incidence of Displacement⁴²

DISPLACEMENT RATES ⁴³	1981-82	1991-92
Total	3.9	3.8
Occupations		
White-Collar	2.6	3.6
Blue-Collar	7.3	5.2
Age		
25-34	5.0	3.8
35-44	3.8	3.9
45-54	3.0	3.8
55+	3.6	4.3

What is significant about the BLS Survey is that the displacement rates for older workers were higher during the 1991-92 recessionary period than in 1981-1982, even though the recession of the early 1980s was more severe than the one in the early 1990s. While it is difficult to determine precisely what impact business cycles have on displacement rates, the survey, based on 1991-92 data, shows that displacement rates for older workers have clearly risen over the two periods measured. As Table I shows, older workers were considerably more at risk of displacement in 1991-92 than in 1981-82.

Consequently, even though the displacement rates were roughly the same proportionally in the 1991-92 and 1981-82 periods for all workers, there was a corresponding increase in the displacement for

41. REPORT, *supra* note 26.

42. BUREAU OF LABOR STATISTICS, *supra* note 39.

43. Expressed as a percent of workers with three or more years of tenure on their current job.

workers who were fifty-five years old or older during the 1991-92 period. In reviewing these displacement rates, the Report of the Council of Economic Advisors acknowledged that "[t]hese changes in the incidence of job displacement may be a reason for the reports [in the press] of heightened anxiety regarding job loss."⁴⁴ The Report found that those workers who have been largely immune to layoffs in the past, including educated and highly-skilled workers, now represent a category of workers who are increasingly likely to be displaced.⁴⁵

While the BLS survey covered only the period between 1990 and 1992, the greater incidence of displacement for older workers will more than likely continue to have an impact beyond the current economic recovery. There are a number of reasons for this. Many older workers who were downsized during the early 1990s have probably dropped out of the labor market. Some may have elected to retire early; others have been forced to obtain low paying jobs outside of their career path. For those who have been lucky enough to obtain a high paying job during the recent recovery, there may still be a loss since seniority and other long-term service benefits have been erased. Stewart J. Schwab describes this in terms of career "ladders:" "A major cost of pursuing a career with one firm is that one foregoes other ladders and must start over at the bottom if one leaves the firm."⁴⁶ Downsized workers who do obtain another good job will have to start over at the bottom of the career ladder after reemployment. Finally, the pressures of global competition and the failure of the American economy to grow substantially will certainly cause firms to streamline their production costs even further in the future. This will provide an excuse for downsizing aging late-career workers who earn premium wages and benefits by virtue of time spent with the firm.

Whereas for younger workers, "downsize" means a temporary displacement between jobs, for the older late-career worker, "downsize" means the permanent, irrevocable loss of a career job. For those older workers who have devoted their entire working lives to a particular career job, downsizing during the early 1990s resulted in premature retirement, unemployment, or underemployment in the service sector where most new jobs have been created since the early 1990s. To understand why this is so, we need to consider the economics of opportunistic dismissals generally before considering how opportunistic downsizing can be practiced by American business.

44. See REPORT, *supra* note 26.

45. *Id.*

46. Schwab, *supra* note 3, at 25.

B. The Economics of Opportunistic Dismissals

The economics of opportunistic downsizing is based on the idea that opportunism is a problem for career workers who have long-term employment relationships. In the absence of detailed enforceable contracts regulating behavior, parties to a long-term relationship can still be "locked into" the relationship.⁴⁷ As Stewart J. Schwab has noted, the inability to easily leave the relationship can be explained by "a human capital story that emphasizes 'asset specificity.'"⁴⁸ Drawing from Gary Becker's theory of human capital,⁴⁹ Schwab explains why wages of workers rise over a worker's life-cycle with the firm.

The "human-capital story" posits that employees will become more productive as they obtain job-specific training. Because many skills are learned by direct experience and are specific to the firm, workers take on an "asset specificity" which makes them valuable to the firm.⁵⁰ However, because these firm-specific skills are not useful to other firms,⁵¹ there is a question of whether the employer or the employee should pay for the cost of job-specific training. If the employer pays there will be a problem since "the worker has no incentive to stay with the firm because he earns no more than he could get elsewhere, and so the firm risks losing the employee before it can recoup its training investment."⁵² The solution to this problem involves a sharing of the costs and benefits of firm-specific training: the employee pays for the training by accepting lower wages during the training period occurring at the beginning cycle of the employment relationship, and the employer then pays the employee a higher wage after training.⁵³ Schwab argues that, "[i]n practice, these higher, post-training wages take the form of seniority-based wages and late-vesting

47. See generally Goetz & Scott, *supra* note 3.

48. Schwab, *supra* note 3, at 13. As Schwab notes, Oliver E. Williamson coined the term "asset specificity." *Id.* at 13 n.17 (citing OLIVER E. WILLIAMSON, *THE ECONOMICS OF CAPITALISM* 52-56 (1985)).

49. See GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975). Becker's theory of human capital predicts that workers, rather than the firm, will pay for job-specific training. However, in order to induce workers to pay for the training, employer must compensate them with higher wages after they are trained. Hence, the theory predicts that wages rise with seniority. *Id.* at 15-37.

50. Schwab, *supra* note 3, at 7.

51. Douglas L. Leslie points out that "[t]he key premise of the relational contract model of labor markets is that many job skills are learned on the job and are specific to the firm. Employees work in teams, and tasks are complex." Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 366-67 (1984).

52. Schwab, *supra* note 3, at 7-8.

53. *Id.* at 14.

pensions, which induce workers to stay with the firm after training.”⁵⁴ What is critical to the human capital story is the “self-enforcing feature of the relationship.”⁵⁵

An “expanded efficiency-wage story,” however, explains why the simple human-capital story is not always self-enforcing. The basic insight behind the efficiency-wage story is that wages affect the efficiency of workers. As Schwab has explained: “Because workers want to keep the valuable job, they will work hard to avoid being dismissed. In effect, high wages increase the penalty for being dismissed—a dismissed worker foregoes the large payout. Because workers labor harder than otherwise, the firm can afford the higher compensation.”⁵⁶

The problem with this theory is, as economic studies suggest, wages of workers who are nearing the end of a career with a particular employer exceed the current productivity of the worker.⁵⁷ Once wages exceed the current productivity of the worker, the employer has an economic incentive to terminate the relationship. The employer is then in the position of reaping some of the benefits of job-specific training without having to pay the employee for accepting lower wages at early periods while training on the job. Late-career employees, however, can still be locked-in by virtue of having amassed a stock of specific human capital in job-specific training with the firm.⁵⁸

54. *Id.* at 15 (citing RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 160-63, 410, 425-37 (4th ed. 1991)).

55. Schwab, *supra* note 3, at 15. As Schwab puts it:

Because the parties share the costs and benefits of training throughout the employee's work life, both parties want to continue the relationship. The employer pays employees less than their full value later in their career. This protects employees from discharge because a discharge would harm the employer as well. The late-career wage exceeds, however, the outside wage the employee could receive, thereby discouraging the employee from quitting.

Id.

56. *Id.* at 16.

57. See James L. Medoff & Katharine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. HUM. RESOURCES 186 (1981); James L. Medoff & Katharine G. Abraham, *Experience, Performance, and Earnings*, 95 Q. J. ECON. 703 (1980). Schwab has noted, however, that one of the puzzles posed by Becker's human-capital theory is that the theory predicts that productivity increases faster than wages, but studies of wage rates and productivity “suggest that workers' pay relative to others in their job grade increases with seniority but their relative productivity does not.” Schwab, *supra* note 3, at 16.

58. These job-specific skills are non-transferable to other employers, and hence the employee is locked-in by their prior sunk-cost investment in training. Studies confirm the theory of human capital which posits that displaced workers who have long-time job-specific training suffer greater losses than those of workers with shorter job tenure (in the same industry or occupation). See Robert Topel, *Specific Capital, Mobility, and Wages*:

Once locked-in, late-career employees become vulnerable to opportunistic firings since the self-interest check on arbitrary firings no longer exists; firing such a worker no longer hurts the employer, but is instead in the employer's immediate economic interest.⁵⁹

C. The Organizational and Industry Justifications for Downsizing

Across America, executives at large corporations, like General Motors and International Business Machines (IBM), are struggling to improve their performance in order to satisfy investors. Investors who own shares in the corporation measure performance in terms of a ratio based on earnings per share of stock. The higher the reported profits of the firm, the higher will be the earnings per share and the value of the stock traded on Wall Street. Chief Executive Officers' (CEO) salaries are determined by corporate boards who are primarily interested in satisfying shareholders and potential investors in the corporation. In linking executive compensation to share price, incentives have been created for management to cut costs through work force reductions and downsizings.⁶⁰

To justify the astronomical salaries that CEOs at some of the largest corporations have received during the early 1990s,⁶¹ CEOs and top managers needed to show that their leadership of the firm was profitable for shareholders and investors. The pressure on CEOs and operating managers is to do whatever possible to show a positive earnings performance. The competitive pressures from large corporations announcing substantial cuts in jobs in the early 1990s, in turn, had a

Wages Rise with Job Seniority, 99 J. POL. ECON. 145 (1991); James N. Brown, *Why Do Wages Increase with Tenure? On-the-Job Training and Life-Cycle Wage Growth Observed Within Firms*, 79 AM. ECON. REV. 971 (1989). See also CONGRESSIONAL BUDGET OFFICE, UNITED STATES CONGRESS, *DISPLACED WORKERS: TRENDS IN THE 1980s AND IMPLICATIONS FOR THE FUTURE* 2 n.3 (1993).

59. Schwab, *supra* note 3, at 19.

60. See Cappelli, *supra* note 14, at 570-71.

61. See Sloan, *supra* note 21, at 43-44, 46. Commentators have noted that:

Many people contend that American executives are overpaid—and that they should share the pain in bad times, or when layoffs are made. . . . Often cited is Robert E. Allen, chief executive of AT&T. Since 1986, AT&T has cut its work force by 125,000 people, but Mr. Allen's salary and bonus have increased fourfold. . . . AT&T's board says Mr. Allen is the best man to lead AT&T in the new era of deregulated telecommunications. But his critics point out that he also headed AT&T in 1990, when it bought the big computer company NCR for \$7.5 billion. The NCR acquisition, AT&T eventually conceded, was all but a complete failure.

David E. Sanger & Steve Lohr, *A Search for Answers to Avoid the Layoffs*, N.Y. TIMES, Mar. 9, 1996, at A12.

strong influence on the business community. When IBM announced its decision to cut thousands of jobs in early 1990, the announcement was followed shortly thereafter by a wave of layoffs among other Fortune 500 companies.⁶² The fact that the stock market tended to react positively to these downsizing decisions created further pressure to cut jobs.⁶³

CEOs and operating managers have thus looked to labor cost savings as a means for improving the profitability of their operations. One way to do this is to cut costs and streamline production in order to reduce the cost of production in the short run. Indeed, during the early 1990s, large corporations competed on the basis of cost-efficiency strategies implemented to cut the cost of production. Numerous factors spawned the "race-to-the-bottom" competition to downsize, including executive compensation plans linked to share price, a wave of dramatic downsizing announcements by major companies, and the emergence of a new form of mass-production technology in manufacturing and service industries.⁶⁴ This new form of competition was shaped by the implementation of information technology designed to cut costs by reducing the number of workers needed in production.⁶⁵

Large manufacturing corporations, in attempting to stay ahead of competitors, have cut costs by restructuring their operations, eliminating warehousing and financing costs through "lean production" techniques, and "outsourcing" production to smaller, independent manufacturers whose labor costs are lower.⁶⁶ "Lean production" refers to efforts by mass production industries to cut costs by reducing the need for skilled labor in the production process and by maintaining inventories that arrive "just in time" to save on warehousing and financing costs.⁶⁷ "Outsourcing" refers to the effort of large corpora-

62. See Cappelli, *supra* note 14, at 570.

63. *Id.* at 571.

64. See Uchitelle & Kleinfeld, *supra* note 1, at A14, A28; Capelli, *supra* note 14, at 570-71. I discussed how this new form of competition can be traced to postindustrial theories of corporate organization in my recent article. See Gary Minda, *Aging Workers in The Postindustrial Era*, 26 STETSON L. REV. ____ (1996-97) (forthcoming legal symposium).

65. See Head, *supra* note 14, at 47 (describing how the mass-production economy has threatened the job security of middle-income workers since the onset of the Industrial Revolution).

66. See generally MARTIN KENNEY & RICHARD FLORIDA, *BEYOND MASS PRODUCTION: THE JAPANESE SYSTEM AND ITS TRANSFER TO THE U.S.* (1993). The literature is summarized in Head, *supra* note 14, at 47-52.

67. Simon Head explains that "lean production" involves three main requirements: "[P]roducts must be easy to assemble ('manufacturability'); workers must be less specialized in their skills ('flexibility of labor'); and stocks of inventory must be less costly to

tions seeking to cut their costs by contracting out as much production as possible to nonunion, low-paid workers.⁶⁸

Many service industries including banks, insurance companies, savings and loan institutions, retail and wholesale outlets, restaurants, hotels, and information industries, have undergone a "reengineering revolution" under process-centered principles which streamline job tasks.⁶⁹ This "revolution" resulted in the elimination of large numbers of workers in many companies.⁷⁰ According to Michael Hammer, a chief proponent of the concept of reengineering: "The key word in the definition of reengineering is 'process:' a complete end-to-end set of activities that together create value for a customer."⁷¹

In reality, reengineering is not new; what is new is the information and service industries' application of computer software to streamline and integrate the service process.⁷² Unnecessary tasks are eliminated, and information is shared among all individuals involved in a "process" controlled by a relatively small number of "process specialists." These specialists use computer software to perform functions once divided among a number of workers. Michael Hammer states that "[t]he new processes often called for empowered frontline individuals who would be provided with information and expected to make their own decisions."⁷³

Reengineering has also meant that the conventional managers and the role they performed in the old organizations had to be eliminated. As Hammer put it:

Process centering starts a chain reaction that affects everyone from the frontline performer to the CEO. Not only are old roles either eliminated or transformed beyond recognition, but entirely new ones, like process owner, come into being. If there were a section in the Smithsonian for antiquated artifacts of the American economy, the conventional manager would be the subject of a large display case.⁷⁴

maintain (components arrive at the assembly plant 'just in time,' and so save on both warehousing and financing costs)." Head, *supra* note 14, at 47.

68. See, e.g., JEREMY RIFKIN, *THE END OF WORK* 192 (1996).

69. See MICHAEL HAMMER & JAMES CHAMPY, *REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION* 31-82 (1994).

70. See Head, *supra* note 14, at 49.

71. Michael Hammer, *BEYOND REENGINEERING: HOW THE PROCESS-CENTERED ORGANIZATION IS CHANGING OUR WORK AND OUR LIVES* xii (1996) [hereinafter HAMMER, *BEYOND REENGINEERING*]. See also MICHAEL HAMMER, *THE REENGINEERING REVOLUTION* (1995).

72. See Head, *supra* note 14, at 49.

73. HAMMER, *BEYOND REENGINEERING*, *supra* note 71, at 7-8.

74. *Id.* at 92.

RIF and downsizing occur when businesses implement reengineering and lean production strategies to reduce the number of workers needed in the production process. "Reengineers" and "lean managers" seek to cut as many costs as possible to stay ahead of competitors, to increase profits, and to push up the earnings ratios and share prices of the corporation. Because the compensation of the CEO and top reengineers is linked to the corporate share price, the new breed of reengineers and lean managers competes on the basis of cutting labor costs, which are shaped by outside market forces.⁷⁵

Labor cost containment strategies are not overtly suspect since they can be justified on profit maximization grounds. In the past, firms downsized by cutting jobs in order to save costs in response to short-term economic conditions. However, downsizing during the early 1990s was not precipitated by a cyclical downturn. In fact, the layoffs occurred in the midst of economic recovery and job expansion.⁷⁶ Downsizing has become a corporate strategy motivated by cost reduction, increased profit, and higher share price incentives. However, downsizing has been justified by the notion that eliminating career workers is necessary to permit the corporation to stay profitable.

By eliminating high paying jobs or replacing highly paid workers with less expensive workers, the firm can, so the argument goes, realize substantial savings on its wage bill, maintain production levels, and still be a competitive force in the global economy. However, if the firm saves money on labor costs by downsizing, but total production falls, or if the quality of the output declines, then downsizing will not be cost efficient. Reducing the wage bill of the firm may not in and of itself be efficient if the firm's productivity is negatively affected in terms of total quantity, or the quality of the product declines because replacement workers are less skilled. On the other hand, firms that downsize older workers who are nearing the end of their working careers will downsize for strategic reasons, as noted above, because these workers "often earn more than their current productivity."⁷⁷

It is important to emphasize that a salary which exceeds the worker's current productivity may still be an "efficient wage." An

75. As Peter Cappelli has noted: "The circumstances that helped create formal arrangements for managing employees in large firms, often referred to as internal labour markets, are changing. Internalized employment arrangements that buffered jobs from market pressures are giving way to arrangements that rely much more heavily on outside forces to manage employees." Cappelli, *supra* note 14, at 563.

76. *Id.* at 576.

77. See *supra* notes 57-59 and accompanying text. See also Schwab, *supra* note 3, at 43.

older worker who has invested in job-specific skills may actually be receiving wages which partly repay the worker for incurring the cost of job-specific skills. To allow the employer to terminate such an employee will be "opportunistic" because the employer seeks to avoid repaying the employee for job-specific skills which are not transferable to other employers. Aging late-career employees who have worked hard throughout their careers and who have avoided "shirking" on the job can reasonably expect to be rewarded for being efficient workers. As Chief Judge Richard A. Posner has explained:

The older employee may be more productive by reason of his greater experience, or he may be paid a higher wage either to discourage shirking in his last period of employment or as a reward (akin to a pension in the contract theory of pensions . . .) for not having shirked previously. If he is more productive, then he is not in fact more costly to the firm than a younger, less well paid, but also less productive worker.⁷⁸

Thus, even if an older worker nearing retirement earns a relatively high salary which exceeds that worker's current productivity, it does not mean that such a worker is in fact earning more than an "efficient" wage. As Posner has put it:

[I]f he is being paid a so-called 'efficiency' wage either to discourage shirking or to repay the 'bond' that he posted as a young employee by accepting a lower salary in exchange for an implicit promise of compensation later if he behaved, he is merely receiving the benefit of his bargain.⁷⁹

But the "expanded efficiency wage story" suggests that these workers will be vulnerable to downsizing as they near the end of their careers with the firm.⁸⁰ As Schwab has explained, once late-career employees are paid more than they currently produce, they will be vulnerable to opportunistic firing even though the higher wages of such an employee can be justified in terms of job specific training that the employee "paid for" by accepting lower wages during the employee's earlier work life with the firm.⁸¹ Because of the close connection between these workers' age and the time spent with the firm, most late-career workers affected by downsizing will be over the age of forty and will thus be within the age category protected by

78. POSNER, *supra* note 7, at 336-37.

79. *Id.* at 337.

80. See Schwab, *supra* note 3, at 13.

81. *Id.* at 15.

ADEA.⁸² As to these late-career employees, a form of employer opportunism based on age discrimination can be perpetuated under the guise of cost containment rationales.

A profit maximizing employer who decides to downsize highly paid late-career employees will be motivated to terminate their positions because their salaries and benefits will likely exceed their current productivity. However, because these employees have worked hard during their careers and have invested in their own job training by accepting lower wages during their initial employment with the firm, they have "earned" the higher pay that they receive later in their career. They are thus earning an "efficient" wage and are not *really* being "overpaid."⁸³ These employees are entitled to the benefit of the bargain, and the employer should not be permitted to renege on an implicit promise establishing the long-term relationship and thereby take unfair advantage of the employees' vulnerable position created by substantial performance over years of service.

D. Why CEOs May Be Motivated to Act Opportunistically When They Downsize

Much of the public debate about downsizing assumes that firms downsize in order to be more cost efficient in today's global markets. I want to suggest another possible explanation, one which is independent of the cost containment and efficiency rationales. To put it simply, I suggest that the reason for the downsizing craze during the early 1990s can be explained in terms of a new form of competition that is not based on product prices or costs, but rather, on corporate share price. Since the 1987 crash, the market has exhibited skyrocketing stock prices for some of the largest corporations listed on Standard & Poor's Industrial Fortune 500 Index. During the early 1990s, the Dow Jones average increased by 150 percent, and stock prices on the Dow traded for about twenty-four times their average earnings.⁸⁴ In such a market, large corporations seeking to attract capital investments must show a strong performance record, measured by the quarterly earnings reports which are relied upon by investors in assessing the value of the firm's stock. Moreover, because the compensation of CEOs

82. See Schwab, *supra* note 3, at 45 (noting that "[b]ecause of the close connection between a worker's age and time he spends with the company, ADEA indirectly protects late-career employees as well").

83. *Id.*

84. See Leslie Eaton, *The Storm Clouds Gather Over Wall Street: How 1996 Is Like 1987, and How It Isn't*, N.Y. TIMES, July 17, 1996, at C1, C7.

and the top operating managers of most corporations has been tied to the corporate share price,⁸⁵ there are now strong personal economic incentives for CEOs and top managers to downsize.⁸⁶

Announcements of major downsizing by large corporations were in fact followed by rising stock market prices throughout the 1990s.⁸⁷ As reported in the *New York Times*, "[t]he day Sears announced it was discarding 50,000 jobs, its stock climbed nearly 4 percent. The day Xerox said it would prune 10,000 jobs, its stock surged 7 percent."⁸⁸ The positive reaction of the stock market to downsizing decisions created increasing pressure to downsize.⁸⁹ In essence, a new stock market rationale emerged to justify downsizing; one which benefits CEOs, operating managers, shareholders, and investors, but not workers or the general economy. In cutting jobs to increase profits and share price, downsizing has contributed to the deepening inequality of income levels. A redistribution of income has consequently come about as firm income is shifted from middle-class workers to executives and top operating managers. Allan Greenspan warned Congress in July 1995 that the growing inequality of income in America could become a "major threat to our society."⁹⁰ As investment banker Felix Rohatyn, senior partner of the Wall Street investment banking firm Lazard Freres, has put it:

What is occurring is a huge transfer of wealth from lower skilled, middle-class American workers to the owners of capital as-

85. See Cappelli, *supra* note 14, at 576. See also Head, *supra* note 14, at 50 (discussing a comment by Felix Rohatyn, senior partner of Wall Street investment banking firm Lazard Freres).

86. See Capelli, *supra* note 14, at 576-78. Of course, such a strategy may not always work since stock valuation involves a host of unpredictable and complicated exogenous factors, not all of which are based on the firm's performance. On the other hand, if other firms are downsizing to save costs, and if there is pressure on CEOs to show a positive earnings performance to justify their compensation, then they may decide that downsizing is an advantageous, if not necessary, strategy to protect their own jobs, even if only for one quarter. It would be difficult for CEOs to resist the urge to downsize in order to show a positive quarterly earnings record, especially when they themselves were seeking astronomical salaries and benefits from their governing Board of Directors. See Sloan, *supra* note 21.

87. See Cappelli, *supra* note 14, at 570-71.

88. Uchitelle & Kleinfeld, *supra* note 1, at A16.

89. See Cappelli, *supra* note 14, at 571.

90. Head, *supra* note 14, at 47. As former Labor Secretary Robert B. Reich stated in his last public address as Labor Secretary: "The gap between income, wealth and opportunity (that began 15 years ago) is greater today than at any time in living memory." See Reich *Sounds Warning As He Bids Farewell*, 154 Lab. Rel. Rep. (BNA) 48 (Jan. 20, 1997).

sets and to a new technological aristocracy with a large element of compensation tied to stock values.⁹¹

It may be that downsizing can quickly turn a poor earnings per share ratio to a positive earnings ratio by reducing the cost of production, and, for the immediate short run, improve the earnings picture of the firm in a given quarter. Downsizing can be an effective technique in influencing investors' perceptions of share valuations by showing a healthy, albeit manipulated, quarterly earnings performance. This may explain why a firm might implement a decision to downsize even if it cannot justify its decision on strict cost containment and efficiency grounds.

In looking at the labor costs of different groups of workers, CEOs and operating managers of the firm are likely to conclude that aging late-career employees are more costly to the firm than younger ones because they receive a larger package of wages and benefits. Reducing the wage bill for these workers may be seen as a "quick fix" for improving the firm's earnings performance in the short run, which can influence investors' valuations of the firm's stock, and in turn affect the share price and the compensation of top executives. In order to attract investor capital, CEOs and operating managers want to keep shareholders happy by showing a positive earnings performance. They may decide that the "quick fix" of downsizing is the best way to do this.

By downsizing aging late-career workers for cost containment reasons, however, the corporation is in reality favoring younger workers over older workers. Age thus becomes a factor, albeit an unstated one, in the decision to downsize, even though the express reason given is cost savings. The decision to downsize is rationalized by the firm under cost containment rationales, but age status of employees is what motivates the decision to downsize.

It should be no surprise that downsizing, the 1990s version of permanent career displacement, has become a cause of great anxiety for older workers who have devoted an entire lifetime of employment to a single employer.⁹² Aging workers are prime candidates for downsiz-

91. Felix Rohatyn, *Requiem for a Democrat*, Speech at Wake Forest University (Mar. 17, 1995), *quoted and cited in* Head, *supra* note 14, at 47 n.12 [hereinafter Rohatyn, Speech at Wake Forest Univ.].

92. See Cappelli, *supra* note 14, at 571. While worker loyalty to the corporation was once rewarded with job security, today's loyal workers can not expect to hold on to their jobs for more than a brief period. Most workers today can expect (if they are lucky) to work for a number of different corporations during their working careers. See Uchitelle & Kleinfeld, *supra* note 1, at A17. Older workers, however, once they lose their jobs are

ing because they are perceived by management as being more expensive than younger workers. This is because most corporate decision-makers, looking to the bottom line, tend to correlate wages with age and length of service. Of course, age and salary do not always correlate. A recently hired forty-something employee may not have rendered sufficient service to warrant higher wages and benefits when compared to a twenty-eight year old who has been on the job longer. On the other hand, because age and length of service do correlate positively in most cases, many late-career employees are the first to go when downsizing occurs.

Downsizing has consequently had its greatest impact on aging late-career employees. They are in the class of workers who have suffered the greatest economic hardships from losing career jobs. The downsizing of older late-career workers seems to have created a "contingent work force" made up of relatively highly paid, skilled older workers.⁹³ This contingent work force of experienced workers has become the target of downsizing because these workers are no longer protected by the traditional, internalized labor market of the firm.⁹⁴ After being downsized, aging workers are again displaced by what Felix Rohatyn has called the "harsh and cruel climate" of "advanced capitalism."⁹⁵

While it is true that jobs have been created, many of the new jobs "are in small companies that offer scant benefits and less pay, and many are part-time positions with no benefits at all."⁹⁶ For those older workers who have devoted their entire working lives to working at a particular job, there will be few, if any, alternative positions available after downsizing.⁹⁷ Given the current situation of older workers, what protection, if any, can the downsized older worker expect from

unlikely to find equivalent employment. Downsizing frequently results in permanent unemployment, or underemployment at best.

93. See Head, *supra* note 14, at 47.

94. Cappelli, *supra*, note 14, at 572. The internal labor market once checked employer power by forcing the employer to incur the cost of job-specific skills of the experienced worker. Large corporations are now making less of an investment in skills training of new employees by forcing employees to absorb the cost of their own job training and by forcing them to accept non-permanent (i.e., contingent) employment arrangements. See Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 *STETSON L. REV.* 1 (1996).

95. Rohatyn, Speech at Wake Forest Univ., *supra* note 91. See also Ethan B. Kapstein, *Workers and the World Economy*, *FOREIGN AFF.*, May/June 1996, at 26 (attributing statement to Morris Kleiner of the University of Minnesota).

96. Uchitelle & Kleinfeld, *supra* note 1, at A16.

97. Consider, for example, the plight of Steven Hothausen, a fifties-something bank loan officer who used to make \$1000 per week turned tourist guide, making \$1000 per

existing anti-discrimination legislation? There is in fact very little legal protection for older workers from the consequences of downsizing.

II. The Age Discrimination Act in the New, Ruthless Economy

The Age Discrimination in Employment Act (ADEA),⁹⁸ enacted in 1967, prohibits an employer from discriminating against any employee on the grounds that such employee is forty years of age, or older.⁹⁹ Initially, the protected class included only persons aged forty to sixty-five, permitting a mandatory retirement at age sixty-five.¹⁰⁰ In 1978, however, the age ceiling was raised to seventy, and then removed altogether in 1986.¹⁰¹ Mandatory retirement at any age is now forbidden by the act,¹⁰² as is any measure by which an employer treats an employee unfavorably because of age. One might think that the law of age discrimination would provide a check against opportunistic downsizing, but the reality is that age discrimination law is largely in-

month. See Uchitelle & Kleinfeld, *supra* note 1, at A1. See also Rick Bragg, *Big Holes Where Dignity Used to Be*, N.Y. TIMES, Mar. 5, 1996, at A1.

98. 29 U.S.C. §§ 621-634 (1994).

99. ADEA is broad in coverage and tracks Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e-2(a)(1) (1988). The courts have thus looked to Title VII case law in developing the law of ADEA. Title VII plaintiffs can prove employment discrimination under either of two distinct legal theories—"disparate treatment" and "disparate impact." A plaintiff who brings his or her claim under the disparate treatment theory must demonstrate that the employer intentionally discriminated on the basis of race, gender, religion, or national origin. The disparate impact theory addresses employment practices that are facially neutral but allegedly affect members of a protected class more harshly than those outside the protected class. The disparate impact theory does not require proof of discriminatory motive. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

In this Article I focus on how the disparate treatment theory of Title VII could extend to cover what I call opportunistic downsizing discrimination based on the age of the employee. Opportunistic downsizing could conceivably be established under a disparate impact theory by showing that the firm's downsizing decision has impacted more significantly on late career workers over the age of 40. Some courts, however, have held that ADEA does not recognize disparate impact claims. Compare *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995) (holding that disparate impact theory of Title VII is not applicable to ADEA), with *Houghton v. Sipco, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994) (*contra*). I leave it for another day to set out the arguments for applying the disparate impact theory of Title VII to ADEA litigation involving mass layoffs, RIF, and downsizing.

100. See Age Discrimination in Employment Act of 1967, Pub. L. 90-202 § 12, 81 Stat. 607 (1967).

101. See Pub. L. 95-256 § 3(a), (b)(3), 92 Stat. 189, 190 (1978).

102. See 29 U.S.C. § 631 (1996). ADEA makes an exception for certain executive employees. See *id.* at § (c)(1).

effectual when it comes to protecting older workers from this form of opportunistic age-based disparate treatment.¹⁰³

A. Limitations of ADEA

Reduction-in-force (RIF) strategies associated with restructuring and downsizing are largely immune from ADEA regulation.¹⁰⁴ Older workers who are victims of RIFs have had a difficult time in establishing *prima facie* claims of age discrimination because the employer can always argue that a needed reduction of the work force was a legitimate, nondiscriminatory reason for its actions.¹⁰⁵ Employers have consequently been motivated to permanently lay off older workers as they restructure and reduce the size of their work force without fear of incurring ADEA liability. In RIF cases, employer claims of economic necessity have become a legitimate, nondiscriminatory reason for the permanent layoff of older late-career workers. Because older late-career workers are usually more expensive than younger workers, employers can always argue, and prove, that their decision to discharge was based on the expense of maintaining the employees rather than on the employees' age.

One might think that ADEA would prohibit this practice, since lower paid, younger employees would be favored over higher paid older employees. The courts might, for example, look to discrimination based on wages or length of service as a "proxy" for establishing a *prima facie* showing of age discrimination. Of course, if, in a given case, length of service did not "correlate" with age, or if a non-discriminatory reason could be given for discharge, then the employer could refute the *prima facie* case in the rebuttal stage of the litigation. An employer decision seeking to cut costs by focusing on years of

103. The "first generation" of ADEA cases rested largely on evidence of subjective age bias on the part of the defendant. MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 674 n.1 (1982). Many of these cases involved statements by supervisors and other agents of the employer such as, "You can't teach an old dog new tricks" or "old dogs won't hunt," from which age bias could be inferred. See *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 55 (3d Cir. 1990). As employers have become more sophisticated in avoiding these statements, there has been an effort to develop new strategies for establishing age bias in "second generation" age discrimination litigation.

104. See, e.g., *Allen v. Ethicon, Inc.*, 919 F. Supp. 1093, 1099 (S.D. Ohio 1996) (noting that "[t]he employment discrimination statutes were not intended to protect workers from the harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizings, plant closings, and relocations"). See also *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994).

105. See Jessica Lind, Note, *The Prima Facie Case of Age Discrimination in Reduction-in-Force Cases*, 94 MICH. L. REV. 832, 840 (1995) (noting that ADEA is "incapable of providing remedies for subtle forms of discrimination").

service or salary status may not be circumstantial evidence of age discrimination in every case,¹⁰⁶ but in many cases it may be sufficient to raise an inference of discriminatory intent in order to establish a prima facie violation of ADEA. Liability would depend on whether age actually motivated the employer's decision.

The difficulty of proving age discrimination this way, however, is illustrated by the Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins*.¹⁰⁷ In *Biggins*, a sixty-two year old employee attempted to prove that his employer discriminated against him on the basis of his age because he was fired just before the vesting of his pension.¹⁰⁸ Justice O'Connor, writing for a unanimous Court, found that the First Circuit, in upholding the age discrimination claim, had improperly allowed the plaintiff to establish his prima facie case using circumstantial evidence of pension-plan interference.¹⁰⁹ Justice O'Connor emphasized that the problem with plaintiff's proof was that he attempted to infer age discrimination from length of service. As Justice O'Connor explained, "ADEA only requires an employer to ignore an employee's age . . . it does not specify *further* characteristics that an employer must also ignore."¹¹⁰

Under one view, *Biggins* precludes the use of the employee's pension status, salary level, and, presumably, length of service with the firm as circumstantial evidence to prove unlawful age discrimination. According to this view, *Biggins* rules out the possibility of using salary and pension as a "proxy" for proving age discrimination.¹¹¹ A prime advocate of this view is Michael Zimmer, who has recently argued that *Biggins* creates two serious impediments to age discrimination claims.¹¹² First, it makes it easier for employers to defend against a claim at the rebuttal stage.¹¹³ Instead of producing evidence that they had "legitimate, nondiscriminatory reasons" for their actions, employ-

106. See Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 573 (1996).

107. 507 U.S. 604 (1993).

108. *Id.* at 606.

109. *Id.* at 612.

110. *Id.*

111. This view of *Biggins* finds support in Justice O'Connor's statement that:

The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. . . . Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

507 U.S. at 611.

112. See Zimmer, *supra* note 106, at 571-72.

113. See *id.*

ers can now satisfy their burden by producing evidence of *any* reason so long as the reason is not age.¹¹⁴ As Justice O'Connor explained in *Biggins*, an employer who fires an older black worker because the worker is black cannot be said to have violated ADEA.¹¹⁵ She notes that "[t]he employee's race is an improper reason, but it is improper under Title VII, not ADEA."¹¹⁶

The second impediment established by *Biggins*, according to Zimmer, is that the decision has restricted the "range of circumstantial evidence upon which a fact finder can draw the inference of discrimination."¹¹⁷ In refusing to allow the *Biggins* plaintiff to prove age discrimination on the basis of the employer's pension interference, the Court seemingly ruled out the possibility of proving unlawful motive through circumstantial evidence based on an accumulation of years of service.¹¹⁸ Professor Zimmer's interpretation has been echoed by the Seventh Circuit in an opinion subsequent to *Biggins*.¹¹⁹

If Zimmer's interpretation of *Biggins* is followed, then ADEA would be of little help to older workers who lose their jobs whenever their employer has any other non-age reasons for terminating employment. Pension status or length of service could not be used as proxies for age, even though there might be a positive correlation between pension status or length of service and age. In restricting the range of circumstantial evidence, *Biggins* has potentially opened the door for employers to escape ADEA liability by using length of service, pension status, and salary level as non-discriminatory proxies for firing older workers.

On the other hand, there is an alternative reading of *Biggins*; one which is more optimistic about the possibility of establishing age discrimination claims on the basis of salary and pension status. This al-

114. *See id.* at 572.

115. 507 U.S. at 612.

116. *Id.* As Professor Zimmer has explained:

Thus, the rebuttal burden of the employer is no longer to produce evidence that it had a 'legitimate, nondiscriminatory reason.' Instead, the employer can satisfy its burden of production with evidence of any reason other than an admission that it discriminated on the grounds plaintiff claims (or could still legally claim).

Zimmer, *supra* note 106, at 571-72 (footnote omitted).

117. Zimmer, *supra* note 106, at 572.

118. *See id.* Zimmer supported his position with a recent Second Circuit case, *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 118 (2d Cir. 1991), which rejected a "proxy" age discrimination claim based on a higher salary and seniority due to age in a termination case.

119. *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

ternative reading of *Biggins* finds support in the following statement in the Court's opinion:

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that ADEA makes the two factors equivalent, cf. *Metz*, 828 F.2d at 1208 (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly.¹²⁰

In *Metz v. Transit Mix, Inc.*,¹²¹ the case cited by Justice O'Connor, the Seventh Circuit reversed a trial court judgment for an employer who had fired a fifty-four year old manager and had replaced him with a younger, less expensive co-worker.¹²² The court concluded that the district court had failed to give credit to evidence establishing that the employer had replaced the older manager with a younger worker because his salary was too high.¹²³ *Metz* thus stood for the proposition that salary may be used as a "proxy" or as circumstantial evidence for proving age discrimination. Stewart J. Schwab argues that Justice O'Connor's "enigmatic citation" to *Metz* supports the interpretation that "ADEA protects older workers fired because their salary exceeds current productivity."¹²⁴ Schwab thus offers an alternative way of reading *Biggins*; one which is decidedly more optimistic for plaintiffs than the interpretation offered by Professor Zimmer. It should be noted, however, that the Seventh Circuit itself has subsequently interpreted *Biggins* to support the opposite conclusion.¹²⁵

Whether *Biggins* precludes older workers from using salary and pension status as proxies for proving age discrimination is consequently still a debatable proposition. It is still too early to tell which of these two opposing views of *Biggins* will earn the support of the Supreme Court. How the lower federal courts choose to construe *Biggins* is critical to ADEA plaintiffs because "smoking gun" evidence of age discrimination is rare today as employers have become

120. *Biggins*, 507 U.S. at 612-13.

121. 828 F.2d 1202 (7th Cir. 1987).

122. *Id.* at 1203.

123. *Id.* at 1208.

124. Schwab, *supra* note 3, at 44-45. But see POSNER, *supra* note 7, at 337 (arguing that "the Supreme Court has rejected this approach").

125. See *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

more sophisticated in insulating their actions from ADEA attack.¹²⁶ In order for plaintiffs to enforce the policies established by Congress for curbing age discrimination in employment, it is imperative that the courts interpret ADEA to thwart more sophisticated attempts by employers to discriminate against aging workers on the basis of age.

Indeed, plaintiffs have lost most of the age discrimination suits tried in the courts because of the strict *prima facie* requirement. Recent published studies of ADEA litigation, for example, show that plaintiffs do poorly, winning few of the cases they bring.¹²⁷ The results of these studies were recently confirmed by Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit. In reviewing ADEA cases litigated in his circuit, Posner concluded that only 11.4% of the plaintiffs in his sample of hiring cases prevailed on their age claims,¹²⁸ and that the average damage award represented only "a modest expected gain for a federal case litigated all the way to final judgment."¹²⁹ In Posner's study, 20% of the firing and other discharge cases reached verdicts, where the plaintiffs won 47.7% of the time. Another 74.7% of the cases were disposed of by summary judgment,

126. As Posner has recently observed: "By now . . . employers have largely succeeded in purging such slogans as 'you can't teach an old dog new tricks' from the vocabulary of their supervisory and personnel staffs." POSNER, *supra* note 7, at 335.

127. See Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 IND. & LAB. REL. REV. 64 (1984); Michael Schuster et al., *The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Employer Compliance and Employee Characteristics: A Final Report to the NRTA-AARP Andrus Foundation* (unpublished, School of Management, Syracuse University, June 30, 1987), cited in POSNER, *supra* note 7, at 330 n.16.

128. POSNER, *supra* note 7, at 328-39. Posner's study consisted of all federal court cases under ADEA in which a final decision was rendered between January 1, 1993, and June 30, 1994, on other than procedural grounds and was reported in Westlaw, the West Publishing Company's computerized database of judicial decisions. *Id.* at 330. As Posner notes, the study was not based on a random sample, and therefore, the results of the study cannot be assumed to be representative. *Id.* But Posner's study is reasonably consistent with earlier studies in finding that age claims, especially in hiring cases, are both "relatively rare" and usually unsuccessful.

129. *Id.* at 332. In the 29 cases in which the plaintiff obtained damages in lieu of or in addition to equitable relief in Posner's study, the average damages award was \$257,546. *Id.* at 331. As Posner notes, however:

This is an unimpressive figure when one considers not only that the risk of winning nothing is very great—so that when averaged together with the cases in my sample in which the defendant won, the total damages awarded come to only \$29,360 per case, a modest expected gain for a federal case litigated all the way to final judgment—but also that cases involving large stakes are likely to be over-represented in a sample of cases litigated to judgment. In general, the greater the stakes in a case, the more likely the case is to be litigated rather than to settle.

Id. at 331-32 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 556 (4th ed. 1992)).

where plaintiffs won only 1.6% of those cases; the remaining cases were disposed of by other forms of judgment.¹³⁰ Posner's study for the Seventh Circuit was consistent with a recent nationwide survey of plaintiffs' awards in discrimination suits for wrongful discharge in federal and state courts.¹³¹ According to this study, the rate of recovery by plaintiffs had declined from 67% in 1988 to 48% in 1994 and 1995.¹³²

B. Problems of Proof in RIF and Downsizing Cases

The reason most RIF and downsizing age discrimination cases do so poorly for plaintiffs is that ADEA claims are difficult to prove on every procedural level of the litigation. Consider, for example, what the Supreme Court has said in the context of Title VII to be the "most easily understood type of discrimination" claim—the individual disparate treatment case.¹³³ In the typical disparate treatment case, the plaintiff will claim that she was displaced because she was over forty years of age, but the courts will require that she prove a prima facie case that the employer acted with an intent to discriminate.¹³⁴ An ADEA plaintiff in a RIF or downsizing case can try to satisfy her initial burden of proof by relying upon circumstantial evidence. For example, she might attempt to prove that the employer had downsized

130. POSNER, *supra* note 7, at 335 & n.25. See also *Survey on Verdicts Shows Higher Awards, Less [sic] Wins*, 152 Lab. Rel. Rev. (BNA) 59 (May 13, 1996) [hereinafter *Survey on Verdicts*] (reporting on survey of plaintiffs' awards in discrimination suits for wrongful termination in federal and state courts showing that the rate of recovery by plaintiffs has declined from 67% in 1988 to 48% in 1994 and 1995, whereas compensatory awards by juries have increased by 56% in 1995).

131. *Survey on Verdicts*, *supra* note 130, at 59. This same survey reported that compensatory jury awards had reached a new high in 1995 with a median of \$204,310—a one year increase of 56%. The rise in jury awards may reflect that cases in which plaintiffs prevail involve the most egregious cases of discrimination thus warranting large jury awards.

132. *Id.*

133. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). As Professor Zimmer has noted, however: "The Court's reference to ease of understanding seems rather humorous" given that the concept of individual disparate treatment "is difficult and complicated." Zimmer, *supra* note 106, at 563.

134. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Court clarified the procedural significance of the prima facie case by emphasizing that circumstantial evidence of discrimination must support an unambiguous inference of unlawful discrimination in order to reduce the risk of putting employers to the expensive task of defending frivolous claims. See also Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII*: *United States Postal Service Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1213 (1982) (discussing the similar standard under Title VII). These cases have the effect of requiring the disparate treatment plaintiff to "establish a prima facie case of discrimination by demonstrating that the most common, nondiscriminatory reasons for an employer's actions do not apply." Zimmer, *supra* note 106, at 566.

only those workers over the age of forty, and has since hired a new group of younger replacement workers with fewer skills and less training to do the job.

RIF and downsizing cases are especially difficult for age discrimination plaintiffs under traditional requirements for a showing of a prima facie case. The courts have imported the discrimination analysis developed under Title VII (which regulates, among other things, racial discrimination) in interpreting ADEA.¹³⁵ In the context of Title VII, the Supreme Court has sought to develop a unified structure for individual disparate treatment discrimination claims. In *McDonnell Douglas Corp. v. Green*,¹³⁶ the Supreme Court identified four elements to establish a prima facie case of disparate treatment discrimination based on race in a hiring case.¹³⁷ The four elements are: (1) that [the plaintiff] belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons with the same qualifications as plaintiff.¹³⁸

In the typical discharge case based on age discrimination, where proof of unlawful intent must be established by circumstantial evidence,¹³⁹ the *McDonnell Douglas* prima facie case has been interpreted to require: (1) that plaintiff is in the protected age group; (2) that he or she was discharged; (3) that at the time of the discharge he or she was performing the job at a satisfactory level; and (4) following

135. See, e.g., *Williams v. General Motors Corp.*, 656 F.2d 120, 127 (5th Cir. 1981) (surveying the case law on importing Title VII prima facie requirements to ADEA), *cert. denied*, 455 U.S. 943 (1982).

136. 411 U.S. 792 (1973).

137. *Id.* at 801.

138. *Id.* at 802.

139. ADEA violations may be established by direct or indirect evidence of unlawful age discrimination. See *United Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); Lind, *supra* note 105, at 835-36. Because direct evidence of unlawful age discrimination is rare, the courts have allowed ADEA plaintiffs to establish their prima facie claims by circumstantial evidence. See *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (observing that there is usually no "smoking gun" evidence of unlawful discrimination in ADEA cases); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) (same). *McDonnell Douglas* thus establishes the judicial guidelines for discrimination claims provable by circumstantial evidence. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

the discharge, he or she was replaced by an individual of comparable qualifications outside the protected class.¹⁴⁰

Because the third element, satisfactory performance, is not relevant in RIF cases, and because the fourth element, replacement, would not apply in the RIF context,¹⁴¹ the courts are left with only the first two elements for establishing the prima facie case in RIF cases. The problem is that the first two elements of the *McDonnell Douglas* prima facie case are, in and of themselves, quite incapable of raising a reasonable suspicion of unlawful age discrimination.¹⁴²

In dealing with this problem, the lower federal courts have attempted to construct a modified *McDonnell Douglas* prima facie case crafted especially for the RIF and downsizing contexts.¹⁴³ Unfortunately, they have failed to develop a workable and consistent approach for how this should be done.¹⁴⁴ One approach, adopted by the District of Columbia Circuit in *Coburn v. Pan American World Airways, Inc.*,¹⁴⁵ allows the plaintiff in the RIF context to establish an unlawful inference of age discrimination by proving, by a preponderance of the evidence, that the employer had retained a younger employee whose job responsibilities were substantially the same as that of the plaintiff's former job duties.¹⁴⁶

The *Coburn* standard attempts to modify the *McDonnell Douglas* prima facie requirement by adding a new requirement that would en-

140. See, e.g., *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238-39 & n.5 (4th Cir. 1982).

141. This is because laid-off workers, whose jobs have been permanently displaced, cannot "possibly show that their employer replaced them or sought applicants for a now nonexistent position, as required by the fourth element of the *McDonnell Douglas* prima facie case." Lind, *supra* note 105, at 840. The replacement requirement thus requires that another employee be hired or reassigned to perform the former employee's job duties. See *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990). Replacement would not occur if an employee is permanently laid off and his or her job duties were then redistributed among other existing employees already performing related work. *Id.* See also *Kesselring v. United Technologies Corp.*, 753 F. Supp. 1359, 1364 (S.D. Ohio 1991); Lind, *supra* note 105, at 840 n.45.

142. As Jessica Lind has explained:

The realities of a RIF render strict application of the *McDonnell Douglas* prima facie case impractical. Laid-off employees whose job positions have been eliminated cannot possibly show that their employer replaced them or sought applicants for a now nonexistent position, as required by the fourth element of the *McDonnell Douglas* prima facie case.

Lind, *supra* note 105, at 840.

143. See Lind, *supra* note 105, at 840-45.

144. *Id.*

145. 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

146. *Id.* at 343.

able fact finders in RIF cases to decide whether the evidence justifies a fair inference that a younger worker was treated more favorably than the plaintiff.¹⁴⁷ Under the *Coburn* prima facie standard, plaintiffs would not have to establish that they were more qualified than the younger worker retained by the employer, but instead would merely be required to show that they were within the protected age category and were qualified for the jobs they previously held.¹⁴⁸ The *Coburn* standard thus constitutes a low-burden prima facie case because the relative qualifications of the plaintiff would not be a factor in establishing the inference of unlawful discrimination.¹⁴⁹

The Fifth Circuit adopted a different prima facie standard in *Williams v. General Motors Corp.*¹⁵⁰ In *Williams*, the court concluded that in the RIF context, the question concerning plaintiff's prima facie case "is not why members of the group were discharged or whether they were meeting performance expectations, but whether the particular employees were selected for inclusion on the list for discharge because of their age."¹⁵¹ Instead of focusing on whether the employer retained an equally qualified younger employee, the Fifth Circuit focused instead on whether the RIF plaintiff has "prov[ed] a set of facts

147. *Id.* at 342. See also *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 n.1 (3d Cir. 1988); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987).

148. *Coburn*, 711 F.2d at 343. See also *Lind*, *supra* note 105, at 841.

149. All that is required at the prima facie stage is proof that the employer retained younger employees whose job qualifications and responsibilities were the same as the plaintiffs'. *Coburn*, 711 F.2d at 343. This has led Jessica Lind to complain that the *Coburn* prima facie standard fails to support the necessary inference that the employer had engaged in unlawful age discrimination. See *Lind*, *supra* note 105, at 842. Retention of equally qualified younger employees is said not to be "inherently suspicious" "[b]ecause employers almost invariably retain some younger employees in a workforce reduction, especially in a large-scale reorganization. . . ." *Id.* Lind also argues that the *Coburn* standard fails to take into account the legitimate reasons for the employer's decision since in the typical RIF scenario, "employers commonly justify their dismissal of an older plaintiff by explaining that the plaintiff was less qualified than the retained younger employee." *Id.* (footnote omitted). Lind concludes that "a presumption of age discrimination is inappropriate when the plaintiff shows only that the employer retained a younger, similarly situated employee." *Id.* at 843 (footnote omitted). This Article asserts that the focus of the prima facie standard in RIF cases should be on whether the displaced worker is within the protected age category (40 years or older); is a late-career worker (meaning a long-term employee of the employer); has job-specific skills and training; and is targeted for discharge because he or she is perceived by the employer to be too expensive.

150. 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The *Williams* approach has been adopted by the 11th and 7th circuits. See *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-84 (11th Cir. 1990); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 95-97 (7th Cir. 1985).

151. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

which would enable the fact finder to conclude with reasonable probability that *in the absence of any further explanation*, the adverse employment action was the product of age discrimination."¹⁵²

The *Williams* prima facie approach "simply asks the plaintiff to produce evidence sufficient to support an inference that the employer did not treat age neutrally, as required by ADEA."¹⁵³ The *Williams* standard may be either a "low" or "high" burden test since the fact finder is left to decide for itself what evidence would suffice for prima facie purposes. Moreover, because the *Williams* standard fails to instruct the fact finder as to what evidence is relevant to plaintiff's prima facie burden, there is reason for believing that the standard may cause confusion about the procedural framework crafted by the Supreme Court for employment discrimination cases generally.¹⁵⁴ Formulating a workable prima facie age discrimination standard for RIF and downsizing cases thus requires that the courts first have an understanding of how age discrimination may actually be manifested in RIF and downsizing contexts. Unfortunately, the decisions in cases like *Coburn* and *Williams* have exhibited a lack of judicial understanding about the nature and operation of age discrimination in these contexts and consequently, the courts have been unable to develop a workable

152. *Id.* at 1315 (emphasis added).

153. Lind, *supra* note 105, at 843. See also *Williams*, 656 F.2d at 129-30. The Fifth Circuit concluded in *Williams* that a prima facie case made on the relative performance of employees may be established by showing: (1) the employee was protected by ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing. *Williams*, 12 F.3d at 1315 (citing *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1418 (4th Cir. 1991)).

154. See Lind, *supra* note 105, at 843-44 (arguing that the *Williams* approach "causes confusion" by elevating the "pretext stage" of the discrimination case, a stage that normally follows the prima facie case and defendant's attempted rebuttal, to the prima facie stage). Lind rightly argues that *Williams* leaves unanswered several thorny procedural questions:

In elevating the pretext analysis to the prima facie stage should the court consider *all* pretextual evidence at the prima facie stage or just enough to support an inference of discrimination, leaving the larger pretextual analysis for stage three? In regard to the allocation of proof, should the burden of production still shift to the defendant once the plaintiff presents enough evidence to support an inference of discrimination or is such a shift justified *only* when the plaintiff eliminates the most common proffered reasons for the adverse employment action? If the burden of production does shift to the defendant, what specifically must the defendant show if the plaintiff has disproved already the employer's proffered reason for dismissing the plaintiff at the prima facie stage?

Id. at 845.

modification of the *McDonnell Douglas* prima facie case. To develop a workable prima facie standard, the courts must first understand the problem of age discrimination as it is practiced by corporate decision-makers in the era of downsizing.

However, an understanding of the nature of age discrimination in the RIF and downsizing contexts would require the courts to rethink more than just the prima facie case. Indeed, the entire framework for trying age discrimination cases would have to be retooled. The problem is that even if a workable prima facie case could be developed from *McDonnell Douglas* for the RIF context, it would still be necessary that the courts counter a host of evasive strategies that employers could utilize to defeat liability for practicing age discrimination.

Under Zimmer's reading of the *Biggins* precedent, for example, employers can argue that wage-justified decisions to downsize older workers cannot be used as prima facie circumstantial evidence of age discrimination. However, even if a prima facie case is established by the plaintiff, the employer is allowed an opportunity to rebut the presumption of discriminatory motive by establishing legitimate, nondiscriminatory reasons for its actions. At the "rebuttal stage," the employer can offer evidence to establish that it had nondiscriminatory reasons for its actions.¹⁵⁵ At this stage, the employer does not bear the burden of persuasion, but must only produce admissible evidence of the legitimate, nondiscriminatory reasons for its action to raise "a genuine issue of fact as to whether it discriminated against the plaintiff."¹⁵⁶

Hence, even if a prima facie case of age discrimination is established by the plaintiff, the employer can still evade ADEA liability by asserting a cost containment or efficiency rationale as a legitimate business justification for its actions. And, if the firm wants to truly insulate its position from judicial reversal, it can undertake a host of strategic actions to cover its true motives for downsizing. For example, the firm could choose to downsize some younger workers along with the older workers it wishes to eliminate. This is called "cash-iering." As Posner recently observed: "[A] firm that wants to get rid

155. In the last stage of the litigation, the plaintiff is granted an opportunity to establish that the defendant's proffered reasons for its actions were merely a "pretext" to cover an unlawful motive to discriminate. In this last stage, the presumption of the prima facie case drops out of the litigation, and the plaintiff is met with the general burden of establishing that she was the victim of intentional discrimination. *Burdine*, 450 U.S. at 256; Zimmer, *supra* note 106, at 567-68.

156. Zimmer, *supra* note 106, at 567 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

of an older employee can often do so with near impunity by cashiering a younger employee at the same time."¹⁵⁷ Cashiering of younger workers remains a viable strategy for employers.

The Supreme Court recently concluded in *O'Connor v. Consolidated Coin Caterers Corp.*, a non-RIF case, that the fact that an older employee was replaced by another employee over forty does not preclude a prima facie case of age discrimination.¹⁵⁸ The Court, however, indicated that the fact that a younger employee has been hired to replace an older employee continues to be the touchstone for establishing the prima facie case. As Justice Scalia stated for a unanimous Court: "Because ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."¹⁵⁹ What Justice Scalia and the Court failed to consider is that cashiering of younger employees might be used by employers in non-RIF and RIF cases to disguise their unlawful motive to discriminate against older workers. *O'Connor* may insulate this strategy from ADEA regulation.

There is yet another employer strategy which can effectively insulate employers from ADEA liability in most RIF contests—the "two stage" RIF strategy. Most companies in fact conduct RIFs in two stages. As Zeller and Mooney have noted:

The first phase is generally a voluntary program in which the company offers incentives to induce early retirement or other voluntary separation by those employees who are not yet eligible for normal retirement. The second phase is the involuntary termination plan, focusing upon position elimination, job performance, or some mix of the two.¹⁶⁰

The result of the two phase program of RIF has had the intended consequence of persuading the older employee to voluntarily retire at stage one. As Posner has noted:

157. POSNER, *supra* note 7, at 336. Posner concludes that:

[Cashiering] may be feasible because there is high turnover among young employees anyway and the firm may not yet have invested much in the young employee's firm-specific human capital (a principle reason *why* turnover of young employees is high) and so [the employer] has little to lose from firing him, though concern with reputation must inhibit this Machiavellian strategy to some and perhaps to a great extent.

Id.

158. 116 S. Ct. 1307, 1310 (1996).

159. *Id.*

160. Michael R. Zeller & Michael F. Mooney, *Legally Reducing Work Forces in a Recessionary Economy*, HUM. RESOURCE PROF. 14, 15 (Spring 1992).

[A]nyone who doesn't take the hint and retire early becomes a candidate for phase 2—involuntary termination. And, should this happen, he cannot count on having a good claim of age discrimination, let alone getting a good job with another employer [T]he analysis suggests that it might actually pay an employer to engage in outright age discrimination from time to time in order to increase the incentive of older employees to elect early retirement.¹⁶¹

It should not be surprising then that plaintiffs in RIF cases have fared so poorly in the courts. Employers can target aging late-career workers for permanent layoff and insulate themselves from ADEA liability by relying upon cost containment rationales, cashiering employees, and/or utilizing two-stage RIF strategies. The anti-discrimination principle of ADEA has been frustrated by new employer strategies *and* judicial attitudes that have effectively insulated the employer's true motive from judicial scrutiny under the statute. Federal judges have failed to comprehend how age discrimination is practiced in RIF and downsizing cases because they have lacked convincing explanations for understanding how age discrimination is practiced and because they have been persuaded by conservative critiques of the legislation that age discrimination is a rare phenomena.

The first step toward a more effective law prohibiting age discrimination must be a new reconsideration of the problem of age discrimination in the era of downsizing. What is needed is an explanation of how employers can practice age discrimination in the course of downsizing aging, late-career workers who have spent a working lifetime acquiring job-specific skills. The theory of opportunistic downsizing as discussed above can provide the basis for such an explanation. The next section will briefly set out the framework for the theory of opportunistic downsizing by explaining how and why an employer might act *opportunistically* in targeting older late-career employees for permanent layoff in the downsizing era. In subsequent parts of this Article, I will explain how opportunistic downsizing might be brought within the reach of ADEA and ERISA.¹⁶²

C. Opportunistic Downsizing—The 1990s Version of Age Discrimination

In rejecting the notion that wages could be a proxy for age, and by failing to appreciate the implications of cashiering and two-stage RIF, the courts have implicitly encouraged employers to engage in a form of opportunistic downsizing—employers can target older late-

161. POSNER, *supra* note 7, at 341-42.

162. Part V of the Article will set out more fully the legal framework for bringing opportunistic downsizing within the reach of ADEA and ERISA.

career employees as prime candidates for permanent layoffs in order to maximize the stock market rationale for downsizing. Because workers are usually beyond the age of forty when they reach the end of the career life-cycle, opportunistic firings are most likely to impact older workers; the difference being that instead of calling their dismissal an aged-based "firing," it is called "downsizing."

Late-career employees are vulnerable to opportunistic downsizing because they have invested substantial time in acquiring job-specific training—what economists call job-specific human capital—which is valuable for their own employer and not other employers.¹⁶³ Moreover, in adopting a particular career path with a single employer, late-career employees have benefits which are tied to length of service which make it expensive for them to quit and join another firm.¹⁶⁴ As a consequence of their chosen career paths, late-career employees are locked-in with their firms in ways that make it economically unfeasible to change jobs. Employers, on the other hand, have a financial incentive to downsize aging late-career employees instead of less-expensive employees in order to keep labor costs down. When this results in the displacement of older workers, it is an age-based decision which should trigger *prima facie* liability under ADEA.

Unquestionably, thirty years ago, one would have expected unions to curtail the efforts of employers to compete on the basis of labor costs.¹⁶⁵ Downsizing would have been dealt with during direct voluntary negotiations between the employer and a union selected by the employees as their bargaining representative. At a minimum, labor unions would have forced employers to justify their need to downsize in order to compete, as the United Auto Workers attempted to do

163. See Schwab, *supra* note 3, at 26.

164. *Id.* at 24-25.

165. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 7-13 (1990). In the unionized sector of the work force, management has relied upon the claim that cutting labor costs is necessary in order to streamline the cost of production to render the firm more competitive in the global marketplace. Thus, General Motors Corporation (G.M.) has recently publicized a study by an independent consulting firm showing that its labor costs for automobile parts are \$440 higher per vehicle than those of Ford Motor Company, and \$600 more per vehicle than the Chrysler Corporation's because G.M. relies on its own internal production of parts rather than outsourcing. See Keith Bradsher, *G.M.'s Labor Costs for Parts Said to Be Higher Than Rivals*, N.Y. TIMES, June 25, 1996, at D2. The study has been used by G.M. to bolster its bargaining position in contract negotiations with the United Automobile Workers Union. The union has criticized the study on the ground that the consulting firm that produced the study "had looked only at labor costs and not included the lower quality and lower productivity at many suppliers." *Id.*

in its 1996 contract negotiations with Ford.¹⁶⁶ But since the 1970s, union representation has fallen such that less than eleven percent of the work force is now covered by collective bargaining.¹⁶⁷ Moreover, unions themselves have lost much of their power and are no longer in the position to resist downsizing and RIF strategies, even if they were to make concessions and give back hard-won benefits.¹⁶⁸

With the decline of collective bargaining, there are now no effective checks on the potential for opportunistic downsizing of aging workers. The market does not operate as an effective check because opportunism is behavior that results from long-term employment relations arising out of the absence of detailed terms regulating the behavior of parties.¹⁶⁹ ADEA is, or ought to be, a check against late-career opportunism in the era of downsizing.¹⁷⁰ ADEA, however, has failed to provide such protection.

In today's corporate board rooms, it is the unrestrained "bottom line" corporate decision-making tied to share price that drives the effort to downsize older workers. Because executive compensation is frequently tied to stock values and quarterly profit (or loss) margins today, executives in positions of power make labor relations decisions on the basis of the "bottom line," that is, whether or not the decision will enhance the shareholders' investment by increasing stock prices through positive profitability figures. In cutting labor costs, CEOs hope to improve their profit/loss margins on the accounting ledgers so that investors will perceive their stock as being undervalued.

What is missing in the stock portfolio analysis is a realistic assessment of the relative productivity of workers who have firm-specific skills because of their long service with the firm. Their salaries may be reported as being higher than those of younger workers, but a higher salary may be explained by the higher productivity of an experienced worker, or it might be a type of reward for the cost of job training absorbed by the employee when salary levels were lower. If an older worker is more productive, then he or she may not be more costly to

166. See Keith Bradsher, *U.A.W.'s Pact at Ford Aims at Downsizing*, N.Y. TIMES, Sept. 18, 1996, at D1. The new labor contract, negotiated between Ford and U.A.W. on Sept. 16, 1996, requires Ford to guarantee a minimum number of jobs in exchange for lower union wages.

167. See Eileen McNamara, *Working for the Workers*, BALTIMORE SUN, June 21, 1996 at A21.

168. See Bradsher, *supra* note 166, at D1.

169. Goetz and Scott suggest that parties in long-term relational contracts typically contract on the basis of vague terms. Goetz & Scott, *supra* note 3, at 1092-93. See also Schwab, *supra* note 3, at 20.

170. Cf. Schwab, *supra* note 3, at 43.

the firm than a younger, less experienced worker. As Posner has argued, courts are not likely to take these factors into consideration in ADEA cases: "All the court[s] can see is that the employer had a reason unrelated to age for firing the older worker—he was more expensive."¹⁷¹ In the era of downsizing, it is the "bottom line," more than anything else, that drives corporate and some judicial thinking today. In targeting older employees for downsizing, employers have been utilizing the age of the worker as a basis for determining who gets laid off. In failing to ascertain if older workers are in fact paid an "efficient" wage, corporate decision-makers have utilized a cost containment rationale to cover an age discriminatory motive.

Some have argued that if the employer actually tries to discriminate against older workers in the guise of cutting costs, the word will get around that the employer is a bad employer and this "bad reputation" will discourage the employer and others from engaging in opportunistic behavior out of fear of losing the most productive workers to competitors. Posner and Professor Epstein have both argued that employer opportunism is unlikely to be a significant problem because the employer's concern for its reputation will place a check on its opportunistic behavior.¹⁷²

However, an employer's reputation is unlikely to have a substantial effect on younger job applicants.¹⁷³ Reputational effects will be a check on employer behavior only if employees can act on the reputation by going elsewhere.¹⁷⁴ Job applicants may not be able to "assess

171. POSNER, *supra* note 7, at 337.

172. See *id.* at 342; Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967-68 (1984).

173. As Posner has recently argued, the aging process entails cognitive changes in the form of knowledge and subjective outlook which causes fundamental mental differences in the individual's self-understanding. POSNER, *supra* note 7, at 8-9, 84-94. "[T]he difference between one's young and one's old self may be so profound that the two selves are more fruitfully viewed as two persons rather than as one." *Id.* at 8-9. This suggests that the self definition of the individual changes with age, resulting in shifts in the individual's preference function. A younger employee might discount the possibility that her employer will act opportunistically toward her, even if she is aware of the fact that the employer has acted opportunistically toward other employees.

For it is not a lack of information that drives a wedge between the young and the old self. If it were, then as the number of very old people, nursing homes, geriatric specialists, and so forth increased, as has been happening, young people would find the prospect of becoming old less depressing. They would understand better that most old people really do want to keep on living and do actually enjoy life as distinct from merely dreading death. No such change in the outlook of the young is discernible.

Id. at 87.

174. Cappelli, *supra* note 14, at 588.

an employer's reputation for how it handles senior workers."¹⁷⁵ In any event, "a reputation for harsh personnel policies may not greatly harm declining firms that are not hiring many new workers."¹⁷⁶ When all the leading firms are downsizing at the same time, employees will have nowhere else to turn.¹⁷⁷ It is unlikely that unemployed workers will cease seeking jobs from a firm because it has downsized older workers. It is more likely that they will simply accept the fact that they will have to switch jobs many times during their careers. In the downsized labor markets of the 1990s, the bad reputation of a prospective employer will not be much of a deterrent to job applicants who have been unemployed for months, if not years.

Because reputational effects are not likely to be an effective check on employer opportunism, legal checks are needed to guard against such abuses, especially when age and pension discrimination may be involved. Yet the courts have made it difficult for plaintiffs to prove that downsizing of older employees can be a form of age discrimination. Perhaps Posner is right in suggesting that the courts have been slow to do anything about opportunism in age discrimination cases because judges do not want to "make it difficult for firms to take rational steps to reduce their costs when they find, for whatever reason, that they are paying wages in excess of the market."¹⁷⁸ But if this is the rationale for cases like *Biggins*, as Posner suggests,¹⁷⁹ then what the courts are really saying is that ADEA is largely ineffective in the era of downsizing. If this is true, then there is little, if anything, left of the age discrimination law. ADEA would apply only in the rare case where the plaintiff has some "smoking gun" evidence of age discrimination animus, say in the rare case where a supervisor or manager utters one of those now classic "old dogs don't hunt" statements.¹⁸⁰

175. Schwab, *supra* note 3, at 27 (citing PAUL C. WEILER, GOVERNING THE WORK-PLACE 74 (1990)).

176. Schwab, *supra* note 3, at 27. But a bad reputation as an employer may cause active workers to work less hard. See also *infra* notes 243-46 and accompanying text.

177. Cappelli, *supra* note 14, at 588.

178. POSNER, *supra* note 7, at 337.

179. *Id.*

180. See *Seigel v. Alpha Wire Corp.*, 894 F.2d 50, 55 (3d Cir. 1990). As Posner has noted: "By now, however, employers have largely succeeded in purging such slogans as 'you can't teach an old dog new tricks' from the vocabulary of their supervisory and personnel staffs." POSNER, *supra* note 7, at 335.

III. Downsizing in the Era of the New, Conservative Judiciary

An explanation for the decline of age discrimination in employment litigation¹⁸¹ can also be attributed to changes in judicial attitudes which question the existence of age discrimination in employment. Judges, like corporate CEOs, are "downsizing" age discrimination law through new interpretative strategies which attempt to persuade us that age discrimination is really not a problem in modern work places of the post-industrial firm. Consider, for example, Posner's statements about ADEA in his recent book, *Aging and Old Age*.¹⁸² Posner is responsible for reviewing ADEA decisions of district judges in his circuit. His comments on ADEA provide clues for understanding why ADEA plaintiffs have been having such a difficult time proving their claims in the Seventh Circuit as well as other circuits, since his views are representative of the new, conservative judiciary. Posner stated in his book that ADEA is a "misbegotten venture in tilting at the windmills of ageism;"¹⁸³ that "[t]he age discrimination law is at once inefficient, regressive, and harmful to the elderly."¹⁸⁴

Posner claims that the age discrimination law is inefficient as well as regressive because it forbids employers from using age as a basis for assessing the value of an employee's contribution to the firm.¹⁸⁵ "If employers are forbidden to use efficient methods of evaluation, their labor costs will rise, and it is now generally accepted that increases in payroll taxes or other labor costs are borne largely by the workers themselves, in the form of reduced wages or benefits."¹⁸⁶ Posner believes that age discrimination legislation is bad because it creates an

181. See *supra* notes 127-132 and accompanying text.

182. POSNER, *supra* note 7, at 319-63. Posner's former colleague at the University of Chicago Law School has offered a critique of ADEA and other anti-discrimination laws which is similar to those offered by Posner. See EPSTEIN, *supra* note 12, ch. 21.

183. POSNER, *supra* note 7, at 361.

184. POSNER, *supra* note 7, at 319.

185. "We know that age is often correlated with performance; and with age being directly observable and performance not, it may be entirely rational for even the most intelligent employer to use the former as a proxy for the latter." *Id.* at 325.

186. *Id.* Posner goes on to note that:

The increase in cost operates as a tax, and the incidence of a tax does not depend on which side of the market (here, employer or employee) the tax is assessed on. If employers are forced by law to keep on inefficient older workers, workers as a whole, few of whom either are wealthy or are guilty of 'ageism,' will in effect be taxed for the benefit of these older workers—yet the older, prosperous recipients of substantial public largesse are implausible candidates for the status of an oppressed class.

Id. at 325-26.

artificial interference with the ability of employers to evaluate the contribution of older workers to the firm since the worker's age is an efficient criterion of performance, albeit one which triggers suspicion under ADEA. Because employers are forbidden to use the age proxy, Posner asserts that employers are encouraged to use "other proxies for ability or performance, such as test results, thus 'discriminating' against workers whose performance those proxies underpredict."¹⁸⁷

According to Posner, a worker's age is a useful characteristic that employers need to consider in evaluating and predicting an employee's contribution to the firm. As Posner put it: "We know that age is often correlated with performance; and with age being directly observable and performance not, it may be entirely rational for even the most intelligent employer to use the former as a proxy for the latter."¹⁸⁸ Posner thus argues that employers need to use *age* as a proxy in evaluating the abilities of workers, because individual evaluation would be too expensive. But why allow employers to use the age proxy when the statute allows employers to take into account other "reasonable factors," including "good cause," in taking action that adversely affects older workers?¹⁸⁹ Posner fails to address this question.

Posner nonetheless believes that the age discrimination law is harmful to older workers because it discourages "contracts in which a worker agrees to work for a reduced wage, because of his diminished capacity, in lieu of being discharged."¹⁹⁰ If the law forces employers

187. *Id.* at 326. Posner gives the following example in making this argument: "Airlines, for example, if forbidden to impose mandatory retirement on their pilots, might raise their standards of physical fitness, with the result that some perfectly competent young pilots might be forced out." *Id.* This example is off the mark since the airlines are permitted under ADEA to take into account the physical fitness of pilots as a "reasonable factor." See 29 U.S.C. § 623 (f)(1) (declaring that it is not unlawful "to take any action otherwise prohibited where the differentiation is based on reasonable factors other than age"). Even if forbidden to impose mandatory retirement on pilots, the airlines need not raise standards of physical fitness for all pilots to weed out unfit older ones; they can simply assess the physical ability of older pilots without violating the age prohibition.

188. POSNER, *supra* note 7, at 325.

189. See 29 U.S.C. § 623(f)(1) ("reasonable factors other than age"); 29 U.S.C. § 623(f) ("good cause"). The point is that ADEA permits employers to come forward with evidence of a "legitimate nondiscriminatory reason" for their adverse actions against older employees. See ZIMMER, *supra* note 103, at 705.

190. POSNER, *supra* note 7, at 348. As Posner notes, however:

The age discrimination law does not forbid such contracts, but it makes them unattractive to employers. It is much easier to escape liability by discharging a worker whose productivity has diminished because of his age than by attempting to justify paying a lower wage to the elder of two workers who have the same job.

Id. If age discrimination is truly harmful to older workers, as Posner suggests, then how do we interpret the results of Posner's study of age discrimination litigation which shows that

to forego age-based employment criteria needed to make efficient evaluations of the worker's value, Posner claims that some employers may decide that the safest course of action is simply to avoid hiring older workers.¹⁹¹ It is possible, however, that the same rationale encourages employers to fire otherwise efficient older workers for the same reasons. According to Posner, age discrimination law hurts the old as well as the young because it causes labor-market distortions that interfere with the efficient equilibrium of supply and demand, which operates to ensure that labor is paid a wage equal to the worker's contribution to the firm.¹⁹² Firm-specific training, unlike other types of general skills training, is valuable only to the firm where the skills are learned. According to Posner, this is a major reason why late-career employees must accept lower paying jobs:

[T]his is because the wages in their old jobs will have reflected firm-specific human capital that disappeared when they left and that they cannot readily replace because of the cost of learning new skills, and also because the proximity of these workers to (voluntary) retirement reduces the expected return from investing in learning new skills.¹⁹³

plaintiffs do so poorly in these cases? *See supra* notes 128-132 and accompanying text. Posner seems to be saying two inconsistent things: ADEA litigation is ineffectual given that few plaintiffs succeed on their claims, *and* ADEA litigation is effectual in shaping employer behavior. It would seem, however, that according to Posner's own study, older workers who are victims of discrimination are more likely harmed by ineffectual enforcement of age discrimination law. One must also question Posner's assumption that in the absence of age discrimination law, elder workers would be given a choice to accept reduced wages in lieu of being discharged in recessionary periods. The current displacement rates for older workers noted in Table I, *supra*, suggest that elder workers have no choice in recessionary periods when employers seek to reduce their labor costs by eliminating aging workers who have relatively higher wages. *See supra* notes 42-45 and accompanying text.

191. POSNER, *supra* note 7, at 348. This argument fails to take into account what happens when an older late-career worker is downsized. Such a worker is more likely forced to accept a lower paying job outside the worker's former career because job-specific skills are not transferable to new employers and because other employers are less likely to hire an older worker for a new position that will entail years of job training. Older workers have most likely agreed to work for a reduced wage after being downsized because they are not protected by ADEA.

192. *Id.* at 347-49. Posner thus draws from Gary Becker's human-capital theory which explained why wages rise with seniority, and why employees rather than employers will pay for firm-specific training. *See* BECKER, *supra* note 49, at 15-37. Under Becker's human-capital model, employees become more productive as they obtain firm-specific training. *Id.* Firm-specific training increases the productivity of the worker and thus reduces the worker's cost to the employer. *Id.*

193. POSNER, *supra* note 7, at 321 (citing Diane E. Merz & Philip L. Rones, *Institutional Barriers to Employment of Older Workers*, 112 MONTHLY LAB. REV., Apr. 1989, at 14, 20).

Posner argues that this helps to refute the conclusion of those who attribute age discrimination motives to employers who pay older workers less than what they had been earning at other jobs.¹⁹⁴ The fact that the average wages of older workers are lower can, according to Posner, be explained by reasons unrelated to discrimination.¹⁹⁵ Wage rates of late-career employees will fall when they move to another job because their investment in job-specific training is a non-transferable sunk cost. Posner, however, ignores the problem of opportunistic behavior, which Schwab's analysis of late-career employment has identified as a critical aspect of age discrimination in career employment.¹⁹⁶ To appreciate why Posner ignores problems of opportunistic behavior, one needs to consider what Posner has to say about two types of age discrimination: "animus" and "statistical" discrimination.

"Animus discrimination," or what employment law lawyers know as individual disparate treatment discrimination, is said to be "motivated by ignorance, viciousness, or irrationality, with respect to the value of older people in the workplace."¹⁹⁷ Animus discrimination involves a form of discrimination based on resentment or disdain for older people in our society. "Statistical discrimination," or what employment law lawyers know as disparate impact discrimination, consists of "attributing to all people of a particular age the characteristics of the average person of that age."¹⁹⁸ This "is an example of what economists call statistical discrimination and noneconomists [call] 'stereotyping:' the failure or refusal, normally motivated by the costs of information, to distinguish a particular member of a group from the average member."¹⁹⁹

Posner asserts that animus discrimination is "implausible" in the workplace because the people making employment decisions for corporations about hiring and firing are "at least 40 years old and often much older."²⁰⁰ Because the very people who make employment policy decisions are themselves older, Posner believes that it is unlikely that they would engage in "animus discrimination."²⁰¹ Posner con-

194. *Id.* at 321.

195. *Id.*

196. *See* Schwab, *supra* note 3, at 43-47.

197. POSNER, *supra* note 7, at 320.

198. *Id.* at 322.

199. *Id.*

200. *Id.* at 320.

201. *Id.* Animus discrimination, according to Posner, involves a type of "we-they" thinking characteristic of racial, ethnic, and sexual discrimination. *Id.*

tends that "we-they" thinking is unlikely to play a large role in the treatment of the older worker:

It is as if the vast majority of persons who established employment policies and who made employment decisions were black, federal legislation mandated huge transfer payments from whites to blacks, and blacks occupied most high political offices in the nation. It would be mad in those circumstances to think the nation needed a law that would protect blacks from discrimination in employment.²⁰²

Posner believes that the existence of statistical discrimination is "more plausible," but that this form of discrimination is needed by employers to reduce the cost of making individualized assessments of workers.²⁰³ The age proxy is, according to Posner, an efficient and indispensable tool used by employers to "weed out" inefficient workers.²⁰⁴

Posner is correct in emphasizing that it is the ability to perceive difference that is the most important characteristic of discriminatory behavior generally. Perceived differences are the codes that motivate hierarchical attitudes and beliefs which foster a form of "we-they" thinking necessary for racial, ethnic, religious, and sexual orientation discrimination. In the case of ageism at the work place, however, the "we-they" or "us-them" thinking is quite plausible when viewed within the context of corporate cultures which shape the "corporate concept of self" of top managers. The corporate concept of self is tied to the institutional interests of the corporation, and those interests are shaped by a culture that values youthful appearances and provides economic incentives to executives who reduce costs and increase profits.²⁰⁵

202. *Id.*

203. *Id.*

204. *Id.* at 327-28. Posner raises and rejects an argument that statistical discrimination is inefficient in the case of age because it may cause employees to make a suboptimal investment in their human capital, "because the payback period will be artificially truncated." Posner explains:

A middle-aged professional who rationally believes that he has and will retain youthful energy and intellectual flexibility will nevertheless forego making an investment in human capital that would not be completely amortized until he was 70 years old, if he thinks that he will be forced to retire at age 65 or denied a promotion merely because of the average characteristics of his age cohort.

Id. at 327. Posner concludes that the argument that statistical discrimination is inefficient is "unpersuasive" because "prohibiting the use of the age proxy will lead to the substitution of other proxies" such that "[t]he problem of underinvestment will be shifted, not solved." *Id.*

205. There is in fact some anecdotal evidence suggesting that forty-something executives are taking some rather extreme measures to maintain a youthful self-image. As re-

Legal theorists have long since discarded the antiquated concept which regards individuals as having an "unencumbered" concept of self.²⁰⁶ Posner seemingly acknowledges this in recognizing that "[t]he idea that the individual can be modeled as a locus of competing selves (simultaneous or successive) is not new" even though "it remains esoteric and is disregarded in most economic analysis."²⁰⁷ On the other hand, assuming that a corporate decision-maker over the age of forty would have the same outlook and concept of self of a forty-something downsized worker, Posner uncritically and mistakenly assumes that age renders an individual's concept of self unencumbered by context. What Posner fails to recognize is that corporate decision-makers, even though they may themselves be over the age of forty, may have internalized a corporate concept of self situated within a culture which values youth and exhibits a bias against late-career aging workers who are as old as they.

The fact that the people who do the hiring and firing are generally as old as the people they hire and fire does not therefore mean that animus discrimination is "implausible" in the face-lifted, tummy-tucked jungle of corporate America.²⁰⁸ The new-style manager

cently reported in the *New York Times*, CEOs and high level managers are taking their hard earned salaries and investing in face-lifts, tummy-tucks, hair-coloring, and other cosmetic and fashion techniques to look younger on the job. See Amy M. Spindler, *It's a Face-Lifted, Tummy-Tucked Jungle Out There: Fearing the Ax, Men Choose the Scalpel*, N.Y. TIMES, June 9, 1996, § 3, at 1. "Because of downsizing[,] the 50-year-old is in competition with the 30-year-old." *Id.* at 8. Older executives are thus turning to hair coloring and cosmetic surgery to maintain the appearance of youth. In the youth-dominated world of the downsized corporations, executives are getting "face lifts and mouth bridgework" and "tummy tuckers and elevator shoes" to shed years from the resumes. *Id.* It has been reported, for example, that "sales of a Clairol product, Men's Choice hair coloring, have risen 30 percent in three years" and according to the company's own study, "10 percent of the 45 million American men in their 40s and 50s were coloring their hair." *Id.* As one cosmetic trade industry executive put it: "Look at Bob Dole. Is he walking around with white hair? Go walk through the executive suite. You don't see many pouchy-looking people." *Id.* (citing statement of Dale Winston, President of Battalia Winston International). The fact that corporate executives are resorting to expensive and risky surgical measures to appear young may suggest that corporate decision-makers are attempting to identify their concept of self with that of a younger person. They are trying to look youthful in today's corporate culture of downsizing because they know that in today's corporate environment, advanced age is not a virtue. Indeed, looking old seems to be a good way of targeting oneself as a potential candidate for downsizing. Animus discrimination is quite plausible when one considers how the current corporate culture seems to associate a youthful appearance with success and employment.

206. See Michael Sandel, *Introduction*, in *LIBERALISM AND ITS CRITICS* 6, 6-7 (M. Sandel ed., 1982).

207. POSNER, *supra* note 7, at 84.

208. Ironically, there has been a positive job justification for this: "[D]ownsizing seems to have helped spur a boom in another area: businesses that offer shortcuts for making

schooled in the techniques of reengineering and lean manufacturing is likely to see late-career employees as being out of touch with the modern process orientation and therefore "old," in terms of what it takes to be successful for today's management.

As the business consultant Michael Hammer has said of conventional managers who are being replaced by a "handful of process owners and coaches:"

Most of what managers have learned from advancing themselves in a traditional structure is at best useless and at worst dysfunctional for the new environment. Very few have the disciplined process design and improvement skills required for process ownership. Even fewer are comfortable with personal coaching after years in a corporate culture that put a premium on ambition, aggression, and personal toughness. Many old-style managers won't want to make the transition—not because the transition itself is so tough, but because the new work is. One insightful executive who *has* adapted speaks of "a trick" having been played on managers. One reason many of them worked hard when they were young, he explains, was to get to a senior level where they would be able to ease up and enjoy their perks. But the new-style management, which requires a relentless drive for continuous improvement or an intense concern for enhancing people and their abilities, is extraordinarily demanding. The net result of all this is that most companies find themselves awash in surplus managers—and simultaneously hard-pressed to fill the new roles of coach and process owner.²⁰⁹

Hammer's chilling assessment of the plight of the "old-style" managers describes how the emerging culture of the firm is shaping corporate thinking about downsizing and restructuring. In the new cultural environment of the corporation, workers must be sacrificed to salvage the organization.²¹⁰ As R. Alan Hunter, president of Stanley Works, rhetorically put it: "Is it better to have 100 people in a world-class plant or 120 in a plant that is not world-class and might not survive?"²¹¹ The prevailing corporate wisdom seems to be that "unless companies are free to shrink—or die altogether—the American economy will come to resemble those of European nations, where the social prohibition against layoffs has made companies reluctant to expand or test new business [strategies]."²¹² The emerging ideology of reengineering and lean production of the new corporation thus en-

men look young, healthy and fit. Call it an era of faux fitness." Spindler, *supra* note 205, at 1.

209. HAMMER, BEYOND REENGINEERING, *supra* note 71, at 130-31.

210. Uchitelle & Kleinfeld, *supra* note 1, at A16.

211. *Id.*

212. HAMMER, BEYOND ENGINEERING, *supra* note 71, at 197. It is worth noting that European firms have apparently gotten the message since they have begun to downsize

courages senior executives to accept the inevitability of downsizing older late-career workers in order to save the organization from the imagined dire consequences of global competition.

There is, of course, some reason to believe that downsizing can lead to "immediate rewards on Wall Street, as investors bid up the share prices of companies that announce [job] cuts,"²¹³ even though there is "scant evidence that downsizing helps investors" or is a consistent long-term profit-maximization strategy for the firm.²¹⁴ The prevailing folklore of corporate culture helps to explain why the people who make employment policies for corporate employers are able to rationalize the need to terminate the employment relation of career workers who are of equal age and seniority. To put the point differently, the kind of "we-they" thinking which Posner claims fosters racial, ethnic, and sexual discrimination is a very plausible mechanism that affects the treatment of older workers targeted for downsizing.

Downsized workers, who are unable to buy tummy tucks or face lifts, are never given a chance to show that they can fill the "new roles of coach and process owner" in the reengineered and lean manufacturing firm. They are the ones who must accept the hardships of downsizing, not CEOs, top managers, or shareholders. In thinking of late-career employees as "human capital" assets of the corporation, senior executives are able to distance themselves from the human dimension of downsizing decision-making. They become accustomed to the notion that aging workers are like a used-up piece of machinery which must be "discarded" to make room for a new and improved process of production. The "downsized" expectations of employees consequently create a growing sense in the work force of less security, less stability, and an overall absence of a shared civic life.²¹⁵ These

their work forces at about the same pace practiced by American firms in the early 1990s. *Id.*

213. *Id.* at 199.

214. *Id.* at 199-200 (reporting on a study by Wayne Cascio, a professor of management at the University of Colorado, which tracked the stock prices of 25 companies that downsized over a 3 year period and concluded that "downsizing is no magic bullet," because "[o]ften, there is no payoff").

215. In Dayton, Ohio, downsizing at the National Cash Register Company resulted in the elimination of 20,000 jobs, bringing about a ripple of economic, social, and political catastrophes that have forever changed the way people live. See Sara Rimer, *A Hometown Feels Less Like Home*, N.Y. TIMES, Mar. 6, 1996, at A1. Volunteer workers are difficult to recruit now as many of those who provided service in the past have moved away. *Id.* New jobs have been created but many of them have been in the lower-paying retail and service field forcing mothers to work in order to meet family expenses. *Id.* The constant movement of families into and out of the community has made it difficult for anyone to get to know each other, and the longer hours of work have pretty much eliminated any opportu-

"costs" do not go into the decision-mix leading to the downsizing of older workers. Employees feel more vulnerable and therefore less willing to work as hard if they believe they may be let go in the near future.²¹⁶

Opportunistic behavior toward late-career workers should be an important justification for ADEA regulation, and an important reason for enforcing age discrimination law. As Schwab noted: "By prohibiting employers from firing workers above the age of forty because of their age, ADEA protects older workers from discharges based upon stereotypes that lead employers to underestimate their productivity."²¹⁷ An older worker's contribution to the firm is likely to be underestimated whenever downsizing is involved because individual evaluation of each worker's contribution to the firm is not performed and because bottom-line profit and loss thinking is the dominant criterion in deciding whom to downsize.

As previously noted,²¹⁸ one of the most disturbing consequences of the downsizing phenomenon is that it may encourage corporate decision-makers to positively correlate age and labor cost *without* considering the value of the older worker's contribution to the firm in earlier periods. This is because downsizing takes into account only one factor—the current wage level of the employee. "Companies add up their costs per employee and say, 'If we have 10,000 fewer employees, that will save us that much in expenses and make us that much more profitable.' So they cut 10,000 people."²¹⁹ While these layoffs affect all workers, it is the older worker who is most likely to be a candidate for being downsized because he or she will likely earn a higher salary and level of benefits due to increased productivity as a result of firm-specific training and experience.²²⁰

nities for much social and civic life. *Id.* Dayton's identity seems to have been lost, as its citizens work two or three jobs to make up for the economic loss of being downsized. *Id.* For those workers who have survived the latest round of downsizing, there is a feeling of impending doom of future downsizing to deal with on a daily basis. *Id.*

216. Human-capital theory predicts that workers will be more willing to invest in job training the longer they expect to remain working. See Anne Beeson Royalty, *The Effects Of Job Turnover On The Training of Men and Women*, 49 INDUS. & LAB. REL. REV. 506 (1996). See also Schwab, *supra* note 3, at 21-24 (discussing employer vulnerability to shirking).

217. Schwab, *supra* note 3, at 43.

218. See Part I *supra*.

219. Sanger & Lohr, *supra* note 61, at A12.

220. As Posner acknowledges:

The older employee may be more productive by reason of his greater experience, or he may be paid a higher wage either to discourage shirking in his last period of employment or as a reward (akin to a pension) for not having shirked previously.

As Posner's analysis suggests, however, advanced age is unlikely to be a good predictor of the likelihood that a plaintiff would win an age discrimination suit because "[t]he older the employee, the easier it will be for the employer to make a plausible case that the employee was fired [or downsized] because he was failing or too expensive, and not because of his age as such."²²¹ Posner's intellectual arguments for "downsizing" age discrimination law thus ignore the potential for opportunistic behavior in long-term career employment. In ignoring the dangers of opportunistic firings and downsizings, Posner subordinates the anti-discrimination principle of ADEA to the cost containment rationales of business.

What is interesting about Posner's arguments is that they are being made not by a wild-eyed legal academic but by a former conservative legal academic who is now a respected federal circuit chief judge responsible for enforcing federal anti-discrimination law at the very time that corporate America is engaged in a sustained policy of permanent displacement of older workers. Downsizing is apparently a phenomenon that is occurring in jurisprudence as well as in labor markets. Age discrimination law is downsized by a jurisprudence that supports and defends the "harsh and cruel climate" of "advanced capitalism," and overlooks the sad realities of the plight of most older workers today.

IV. Downsizing and Pension Discrimination

There are other legal remedies which the downsized older employee might seek in addition to those of ADEA.²²² In the *Biggins* case, for example, the Supreme Court found that while the sixty-two year old employee who claimed that he was fired just before the vesting of his retirement pension failed to state a cause of action under ADEA, he was entitled to pursue a claim under section 510 of the Employee Retirement Income Security Act of 1974 (ERISA).²²³ ERISA is a complex statute that was created mainly to protect pension benefits and other types of deferred compensation. Section 510 of ERISA makes it unlawful "for any person to discharge, fine, suspend,

If he is more productive, then he is not in fact more costly to the firm than a younger, less well paid, but also less productive worker.

POSNER, *supra* note 7, at 336-37.

221. *Id.* at 337.

222. Curiously, both Posner and Epstein ignore pension discrimination in employment under ERISA.

223. See generally *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan."²²⁴ One might argue, as the *Biggins* plaintiff argued,²²⁵ that downsizing of an older employee whose retirement benefits are about to vest constitutes a prima facie violation of section 510 since the permanent layoff of the employee may have been motivated by a desire to interfere with the employee's pension benefits protected under ERISA.

A. Limitations of ERISA Discrimination Litigation

ERISA claims, however, are not likely to prevail for the same reason that ADEA claims do poorly in the courts. ERISA plaintiffs are required to prove, by a preponderance of the evidence, that their discharge was motivated by an intent to interfere with their benefits protected by ERISA.²²⁶ In order to establish proof of the intent to discriminate, the ERISA plaintiff is very much in the same position as an ADEA plaintiff seeking to prove unlawful age discrimination. What makes it hard for these plaintiffs to successfully establish their discrimination claims is that employers can claim that they were discharged for cost containment reasons—a nondiscriminatory business justification. Indeed, in the ERISA context, discrimination is even harder to prove since the courts frequently defer to the business judgment of trustees about matters such as cost containment and the financial integrity of pension plans.²²⁷ Consequently, once the employer establishes a legitimate business reason for its action the ERISA case is over.

In *McGann v. H&H Music Co.*,²²⁸ for example, an employer capped the health benefits for AIDS-infected workers after learning that one of his employees was infected with AIDS. The cap imposed a lifetime maximum of \$5000 for AIDS-related claims, whereas previ-

224. 29 U.S.C. § 1140 (1974).

225. *Biggins*, 507 U.S. at 608.

226. See *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 650 (10th Cir. 1993) (dismissal of an HIV-positive employee covered under an ERISA plan held not to be unlawful discrimination under ERISA because the employer had non-discriminatory reasons to justify the dismissal).

227. For a discussion of the case law, see Lorraine Schmall, *Toward Full Participation and Protection of the Worker with Illness: The Failure of Federal Health Law After McGann v. H&H Music Co.*, 29 WAKE FOREST L. REV. 781, 806 n.134 (1994). *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984), is an exception, but as Professor Schmall notes, "[v]ery few courts have followed *Folz*." *Id.* at 806.

228. 946 F.2d 401, 403 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

ously there had been a one million dollar limit.²²⁹ The plaintiff claimed that the employer discriminated against him in violation of section 510 on the grounds that the AIDS-related cap was a retaliation for the exercise of his rights under the employer's medical plan covered by ERISA.²³⁰ The employer argued in its defense that the cap on AIDS-related benefits was necessary to protect the financial integrity of the plan.²³¹ The Fifth Circuit accepted the employer's position and dismissed the discrimination claim after concluding that the employer had acted in the best interest of the beneficiaries as a whole in protecting the plan from the financial risks posed by future AIDS-related claims.²³²

H&H Music indicates the difficulty that most late-career plaintiffs would have in attempting to challenge downsizing on the ground that it was done to interfere with their pension benefits. Employers can simply argue that in today's global economy, competition demands that the firm cut costs whenever possible. Outsourcing, restructuring, lean manufacturing, RIF, and other business strategies resulting in the downsizing of late-career employees can be justified on cost containment and competitive market rationales. It is highly unlikely that courts would interfere with the efforts of corporations seeking to reduce costs by eliminating employees who earn premium wages as a result of their length of service.

Opportunistic downsizing justified on cost containment rationales can thus provide employers with a defense to discrimination claims brought under ERISA. Because late-career employees are likely to have higher salary levels and benefit packages as compared to younger employees, they will be perceived to be more "expensive" even if they are in fact more productive as a result of possessing job-specific training. This gives the downsizing employer a basis for claiming that downsizing such employees is the result of a legitimate business justification—late-career employees are too expensive to retain even though they may also lose their pension benefits.

In such cases, all the courts will see is that the employer had a reason unrelated to pension benefits for dismissing the late-career employee. ERISA, like ADEA, is therefore unlikely to deter opportunistic downsizing of older workers. The fact that many late-career employees will be over the age of forty becomes merely an unavoida-

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 407-08.

ble consequence of downsizing in the eyes of the law. Age as such is likely to be viewed as an ancillary factor of an otherwise legitimate business decision. What is not seen is how pension discrimination can be justified by the cost containment rationales of downsizing.

V. Bringing Opportunistic Downsizing Within the Age and Pension Discrimination Law

Downsizing has become a cause of great anxiety for older workers who have devoted an entire lifetime of employment to a corporation or firm. Indeed, while worker loyalty to the corporation was once rewarded with job security, today's loyal workers cannot expect to hold on to their jobs for more than a brief period. What most workers can expect, if they are lucky, is to work for a number of different corporations during their working careers. Older workers, however, once they have lost their jobs, are unlikely to find substantially equivalent employment. For employees over the age of forty or fifty, downsizing often results in permanent unemployment, or underemployment at best.

What is needed today is an understanding of how age discrimination actually operates in non-recessionary periods when RIF and downsizing occur. It is surprising that no one has offered an explanation of the nature and consequences of age discrimination, let alone an explanation of age discrimination in the era of RIF and downsizing. All that has been offered to date are analytical comparisons drawn from the analysis of race and sex discrimination. Indeed, the two leading conservative legal scholars discussed in this Article, Posner and Epstein, have recently offered severe criticism of ADEA on the ground that age discrimination is unlike the "we-they" discrimination characteristic of racism or sexism, and that older workers are not therefore a "victim class" deserving the special protection of age discrimination legislation. In so arguing, these critics have exploited a serious weakness in the law of age discrimination.²³³

A. Opportunistic Downsizing and ADEA

Because ADEA arose out of the legal culture of Title VII of the 1964 Civil Rights Act,²³⁴ and since the language of ADEA tracks that of Title VII, judges look to Title VII case law in dealing with ADEA

233. See POSNER, *supra* note 7, at 298-363; EPSTEIN, *supra* note 12, at 441-79.

234. 42 U.S.C. § 2000e (1988). See SECRETARY OF LABOR, NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT (1977).

claims.²³⁵ Thus, age issues have been analyzed by the judiciary as if they were the same as those involving race and sex.²³⁶ The traditional justification for ADEA is that age discrimination is analogous to racism and sexism. Indeed, the existing case law under ADEA has developed under the assumption that ADEA is so much like other anti-discrimination laws that the theoretical work done under Title VII could help to fill in the theoretical spaces in ADEA. Judges have thus assumed that Title VII standards applicable to race and gender claims were also relevant to age claims.

Hence, the disparate treatment theory first developed in *McDonnell Douglas Corp. v. Green*²³⁷ and the disparate impact theory of *Griggs v. Duke Power Co.*²³⁸ have been relied upon to resolve ADEA claims, even though there is reason to question the applicability of disparate treatment/impact of Title VII to ADEA.²³⁹ In reading the cases, one gets the impression that "[t]he ADEA edifice is today every bit as complex and formidable as that which surrounds Title VII."²⁴⁰ And yet, as critics such as Posner and Epstein have argued, there is little theoretical work to justify the case in favor of age discrimination legislation in the first instance. If discrimination based on age is unlike discrimination based on race and gender, then one can question the wisdom of age discrimination as such. Both Posner and Epstein begin their critiques of ADEA by first pointing out the differences between age discrimination and race and gender discrimination.²⁴¹

Epstein emphasizes that unlike discrimination on the basis of race and sex, which defines a victim class, age and aging is something that "binds the very persons who institute it."²⁴² As Epstein put it:

Age restrictions are not some crude effort by one group of persons to obtain advancement at the expense of strangers. Men will never become women; whites will never become blacks. Racial and sexual groups hence face some temptation to impose (especially through

235. See, e.g., *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1164 (8th Cir. 1985); *Loeb v. Textron*, 600 F.2d 1003, 1015-16 (1st Cir. 1979).

236. See *supra* note 235.

237. See 411 U.S. 792 (1973).

238. See 401 U.S. 424 (1971).

239. Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995) (arguing that disparate impact theory should not be imported from Title VII jurisprudence to the ADEA context because ADEA's purposes, history, and effects are significantly different from those of Title VII).

240. EPSTEIN, *supra* note 12, at 443.

241. *Id.* at 447-48; POSNER, *supra* note 7, at 320.

242. EPSTEIN, *supra* note 12, at 447 (emphasis in original).

legislation) costs on a group of which they will never be a part; mandated racial segregation was one deplorable consequence of that tendency. But younger employees will become older employees in the ordinary course of life, and they will be bound by the very restrictions that typically are implemented by senior partners in the first place. Even in firms that start life with no old partners, it is common to find restrictions that call for a buyout of interest at some specified age.²⁴³

As we have seen,²⁴⁴ Posner makes a similar point in arguing that animus age discrimination is implausible at the workplace because "the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities."²⁴⁵

The critics of ADEA thus premise their criticism on the apparent distinction between age discrimination and other forms of invidious discrimination. However, there is reason for the view that there is not much difference between age discrimination and race or sex discrimination; and contrary to the view of critics, the similarity between ageism and racism and sexism is reason to enforce the original purpose of age discrimination legislation. What binds these forms of discrimination is a systematic undervaluation by the dominant culture of workers, motivated by stereotypical thinking about old people, people of color, women, gays, lesbians, and other groups. Discrimination arises at the workplace because older workers, people of color, women, and gays and lesbians are not valued equally with younger, white, male, straight workers. There are, of course, other possible reasons that could account for the existence of stereotypes disfavoring older workers, people of color, women, and gays and lesbians. In the case of ageism at the workplace, however, it is stereotypical thinking that underestimates the *value* of older people which underlies age discrimination in employment.²⁴⁶

What is needed then is an understanding of how the mechanism of age discrimination actually affects the perception of a worker's value in downsizing and RIF actions in non-recessionary periods. My general claim is that opportunistic downsizing can serve to perpetuate stereotypes about older workers which underestimate their value. To check such behavior, ADEA must be allowed to protect late-career employees from opportunistic layoffs, downsizing, and RIF strategies

243. *Id.* at 447-48.

244. See *supra* notes 200-202 and accompanying text.

245. POSNER, *supra* note 7, at 321.

246. See POSNER, *supra* note 7, at 322 (citing ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 5 (1990)).

which are implemented for the purpose of eliminating aging late-career workers because they are too expensive.

If the employer seeks to target aging late-career workers for downsizing, then the courts should be suspicious of the employer's decision. If the employer attempts to justify its decision on the grounds that aging late-career workers are too expensive, then there is reason to support an inference of age discrimination based on the theory of opportunistic downsizing. In such cases it is more probable than not that the age of the worker is the real reason for the decision.

Because of the close nexus between age and length of service (most late-career employees will be over the age of forty), a court would be justified in finding that the employer's decision to target late-career workers for downsizing was a decision based on the age of the employees. Because ADEA is a motive-based statute, and because disparate treatment rather than disparate impact analysis is favored in ADEA cases, courts require plaintiffs to prove they were fired because of their age. This leads ADEA plaintiffs to interpret the Supreme Court's decision in *Biggins* in accordance with the way Schwab has read the *Biggins* decision.²⁴⁷ As Schwab explained: "In [*Biggins*] the Supreme Court did not preclude the possibility that ADEA protects workers from an employer who fires workers with a certain pension status as a 'proxy' for age, in the sense that the employer may suppose a correlation between the two factors and act on the basis of pension status to get at age."²⁴⁸

Because the unique nature of downsizing and RIF does not entail the hiring of replacement workers, a modified formulation of the prima facie case is warranted. The prima facie case for ADEA claims in RIF and downsizing cases should be modified to require the plaintiff to prove that: 1) he or she is forty years old or older (and hence a member of the protected class); 2) he or she was terminated pursuant to a RIF or downsizing decision; 3) he or she is a late-career employee with firm-specific skills; and 4) he or she was permanently laid-off for being too expensive or costly to the firm.²⁴⁹

247. See *supra* notes 120-125 and accompanying text. Discrimination based on salary as evidence of age discrimination would require the courts to interpret the Supreme Court's decision in *Biggins* as not precluding plaintiffs from using salary as circumstantial evidence of age discrimination.

248. Schwab, *supra* note 3, at 45.

249. This reformulation of the prima facie case is different from the one recently offered by Jessica Lind. See Lind, *supra* note 105, at 845. Lind's formulation requires that the plaintiff's job duties be reassigned to a younger employee less qualified than the plaintiff. *Id.* However, because employers sometimes replace older workers with other older

In establishing the prima facie case that the employer acted with the requisite intent to discriminate, the plaintiff should be allowed to rely on circumstantial evidence such as salary and pension status as a "proxy" for proving that age was a motivating factor in the employer's decision. This would necessitate that courts choose Schwab's interpretation of the Supreme Court's decision in *Biggins*. ADEA should be construed to protect older late-career workers who are fired because their salary exceeds current productivity.

Employers would still be free to rebut the prima facie case by showing that there were legitimate, nondiscriminatory reasons for displacing the late-career employee.²⁵⁰ The burden shifts to the employer because the employer is in the best position to explain the reasons for its actions.²⁵¹ The employer might successfully defend against the prima facie case by showing that its cost containment rationale for downsizing was based on age-neutral considerations which were independent of the salary status of older workers. Technological restructuring, or the elimination of jobs as a result of new technology, reduced market demand for the company's product, and outsourcing and lean manufacturing strategies that do not target older workers by

workers, Lind's test could be evaded by employers practicing "cashiering." Moreover, what is critical to the theory of opportunistic discharge is whether the plaintiff has a sunk cost investment in a long-term relationship. Thus, the focus of the *McDonnell Douglas* prima facie case should be on whether the plaintiff is a late-career employee with job-specific training. This prima facie test could find support in a number of federal court decisions, following the *Williams* approach. See *Williams v. General Motors Corp.*, 656 F.2d 120, 127 (5th Cir. 1981), *cert denied*, 455 U.S. 943 (1982); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-84 (11th Cir. 1990); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 95-97 (7th Cir. 1985); *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 663, 641-45 (5th Cir. 1985). Jessica Lind argues that courts which follow the *Williams* approach require the plaintiff to offer "pretext evidence" to establish the prima facie case. Lind, *supra* note 105, at 844. Lind argues that the "*Williams* approach ignores the fact that in structuring the *McDonnell Douglas* framework, the Supreme Court limited consideration of pretextual evidence to the third stage of analysis, *after* the plaintiff already has established a prima facie case." *Id.* at 845 (emphasis in original). Lind, however, ignores the possibility that plaintiffs may offer evidence of salary as a "proxy" for age in establishing their prima facie case. Employers who assess the costs of employing an older worker when deciding to downsize aging workers are using salary as a "proxy" rather than as a "pretext" in terminating the older worker. The Supreme Court in *Biggins* interpreted the word "proxy" to mean statutory equivalent of age. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993) (citing *Metz*, 828 F.2d at 1208). See also Schwab, *supra* note 3, at 45 n.148.

250. The prima facie case, once established, gives rise to a presumption of age discrimination; the burden then shifts to the employer to produce evidence rebutting the presumption of discrimination. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

251. See Clara B. Burns, Comment, *The Prima Facie Case of Age Discrimination in Reduction-in-Force Layoffs: A Flexible Standard*, 20 TEX. TECH. L. REV. 841, 857 (1989).

using their salary as a proxy for determining termination, may be legitimate justifications sufficient to rebut the prima facie case of age discrimination. The courts might also recognize a business justification defense based on financial necessity; for instance, when it would be necessary for the firm to avoid bankruptcy.

The ADEA plaintiff would then have an opportunity in the third stage of the litigation to demonstrate that the employer's proffered business justification was a mere pretext or that there is a reasonable alternative that would not result in layoffs.²⁵² At this stage, the plaintiff could attack the employer's assertion of cost containment justification for its decision by offering other evidence evincing pretext on the part of the employer.²⁵³ Examples of "pretext evidence" might include a demonstration that the employer engaged in "two-stage" RIF or resorted to "cashiering" in order to cover its true unlawful motive. Arguably, a showing that the employer was motivated by a discriminatory motive rather than the nondiscriminatory motive raised in its defense of the case, would be sufficient to satisfy the plaintiff's ultimate burden of proof.

B. Opportunistic Downsizing under ERISA

Under ERISA,²⁵⁴ a late-career employee whose job is threatened by downsizing should be allowed to allege and prove that downsizing was motivated by an intent to discriminate to prevent the future exercise of rights under a pension plan covered by ERISA. Section 510 of ERISA ostensibly prohibits this form of discrimination in order to protect employees from losing pension benefits protected under federal pension law. To render section 510 more responsive to opportunistic forms of pension discrimination, the courts should be more critical of the proffered cost containment rationales utilized by employers to terminate the jobs of employees nearing retirement.

As the Supreme Court recognized in *Biggins*, an inference of pension discrimination is warranted whenever an employer fires an aging employee nearing retirement and the vesting of his or her pension. Downsized employees should be allowed to seek remedies under sec-

252. After the employer rebuts the prima facie case, the burden shifts again to plaintiff to prove that employer's proffered reason was not the true reason for its actions. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). This is the third and final stage of the litigation.

253. Disproving the employer's proffered reason does not entitle the plaintiff to a judgment as a matter of law. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993).

254. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 11, 12, 15, 18, 22, 26, 29, 31, 42, and 45 U.S.C.).

tion 510 by showing that the employer chose to downsize their jobs in order to avoid incurring expensive pension benefits that were about to vest. Cost containment rationales therefore should not be allowed to immunize these claims from ERISA regulation.

The fact that an employer argues that the business will save money by getting rid of a late-career employee who is nearing retirement is itself sufficient to raise a presumption that the employer was motivated by a desire to avoid paying employee pension benefits. The cost containment rationale in such a case would be probative of the employer's intent. Whether such evidence would provide a sufficient basis to state a cognizable claim under section 510 of ERISA would depend on whether the employee could prove that he or she was fired in order to prevent his or her pension benefits from vesting. If, for example, the plaintiff could show that the alleged savings were insubstantial or alternative cost containment strategies were available and not considered, then the employer's decision to downsize would warrant a presumption that it was done with the intent to discriminate in violation of section 510 of ERISA.

Conclusion

In bringing opportunistic behavior within the reach of age and pension discrimination legislation, the courts would necessarily limit the heretofore carte blanche power of firms to downsize. The proposal for reformulating the current structure of discrimination litigation is intended, however, to place a check only against *opportunistic* downsizing. To ignore this business practice is to render the anti-discrimination provisions of laws like ADEA and ERISA meaningless in the current downsizing era.

The critics of the current anti-discrimination regime established under ADEA and, by implication, ERISA, however, have been quite persuasive in questioning the wisdom of anti-discrimination legislation. In this Article, I have attempted to respond to their criticism by arguing the case for reformulating the law of age and pension discrimination so that it might better respond to the way age and pension discrimination is practiced today in the current downsizing era.

I recognize that there appears to be a growing consensus that the anti-discrimination principle should be discarded in favor of older norms of laissez-faire and free market. The conservative political climate has undoubtedly served to bolster those who want to now repeal federal anti-discrimination legislation. But, before we dismantle the comprehensive anti-discrimination schemes Congress has labored so

hard over the years to erect, we should first try to understand how discrimination may or may not be operating today.

The premise of this Article is that a form of age and pension discrimination has gone largely unregulated under existing federal anti-discrimination legislation. Aging workers have been exposed to otherwise illegal age and pension discrimination as employers downsize and restructure their jobs in order to save the costs of paying their salary and pension benefits. This illegal form of discrimination, which I have called "opportunistic downsizing," ought to be prohibited by the anti-discrimination provisions of ADEA and ERISA. However, because courts and commentators have assumed that cost containment rationales absolutely insulate employer decisions and actions from the anti-discrimination principles of such laws, opportunistic downsizing has gone largely unregulated and unchallenged in the courts.

Some may object on the grounds that an expansion of ADEA and ERISA to cover problems of opportunistic downsizing would promote more costly litigation in the courts. An argument can be made that the anti-discrimination laws should be narrowly construed in order to protect otherwise innocent employers from being swamped with the cost of defending expensive, non-frivolous, but marginal federal discrimination litigation brought under ADEA and ERISA. Judges have a duty to minimize the cost of litigation and to protect employers from frivolous litigation. Of course, the marginality of otherwise meritorious litigation should not deter the courts from their duty to enforce the law. Moreover, it is far from clear that litigation costs justify an explicit judicial policy of under-enforcement.

For the sake of argument, assume that a judicial policy of reduced enforcement of ADEA and ERISA saves employers money that would have to be spent on defending suits, which would otherwise not be screened out by normal court supervision.²⁵⁵ This cost savings in litigation expense would not, in and of itself, be dispositive of the question of whether to bring claims of opportunistic downsizing within ADEA or ERISA. The reason is that there would be other external "costs" incurred.

Consider, for example, federal policy affected by the premature retirement of older downsized workers. If opportunistic downsizing goes unchecked, we can expect to see more older workers forced to retire prematurely. It would encourage more downsizing of older

255. For example, by invoking Rule 11 of the Federal Rules of Civil Procedure.

workers who are still productive. This means that there will be more workers going into retirement and therefore greater resources will be consumed in providing for the new generation of retired workers. As life expectancy expands and the current baby boom generation ages, more of the country's income must be devoted to the needs of retirees.

Workers who have savings and other private sources of retirement funds will be able to take care of themselves upon retirement, but for the vast majority of workers, Social Security will be their only source of retirement income. Social Security is in fact the largest part of the income of America's elderly.²⁵⁶ By the year 2000, there will be twenty-one older persons for every 100 persons between the ages of eighteen and sixty-four.²⁵⁷ There is thus a strong likelihood that there will be a substantial drain on the Social Security system by the end of this century. Indeed, the trustees of the Social Security system have already estimated that revenues will fall short of the scheduled outlays by about thirty percent between 2019 and 2043.²⁵⁸ We are thus facing a serious Social Security crisis.²⁵⁹

There are few options available to resolve this crisis. One solution would be to raise taxes to make up for the shortfall in Social Security revenues. Higher taxes do not seem to be a viable political option in the current political environment. Cutting benefits or soaking the rich might be a second best interim solution, but these stop-gap measures are unlikely to be sufficient to keep the Social Security fund in the black during the next century. Increased savings would be another alternative, but Americans have not shown a willingness to increase their private savings for retirement. The only real alternative which might help to solve the pending crisis may be to keep workers in jobs for additional years in order to ease the retirement squeeze on Social Security. Downsizing of late-career employees, however, has had just the opposite effect—workers who are just entering the prime of their working careers are downsized and rendered either unemployed at a younger than expected age—early fifties or sixties instead

256. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 1186 (3d ed. 1996).

257. U.S. SENATE SPECIAL COMMITTEE ON AGING, *AGING AMERICA: TRENDS AND PROSPECTS* 45 (1981), cited in ROTHSTEIN & LIEBMAN, *supra* note 256, at 1187, 1188.

258. See Peter Passel, *You Saved But They Didn't. So Now What? Cracking the Baby Boom Nest Egg*, N.Y. TIMES, July 7, 1996, § 3, at 1.

259. See PETER G. PETERSON, *WILL AMERICA GROW UP BEFORE IT GROWS OLD? HOW THE COMING SOCIAL SECURITY CRISIS THREATENS YOU, YOUR FAMILY, AND YOUR COUNTRY* 1 (1996).

of sixty-five or over—or underemployed in contingent employment arrangements without employment security.

Of course, a sixty-five year old downsized executive who cannot afford to live on Social Security alone might well decide that he or she has to remain employed. Many retired older workers may decide to return to work after being retired because they are unable to live on Social Security and savings. In returning to the work force, many of these “second career” employees compete with the recently downsized worker for low paying jobs, mainly in the service industry (the proverbial “hamburger flipping” industry). As more workers are downsized, they will be forced to accept jobs that pay less and offer fewer retirement benefits. We can also expect that many more older people will eventually be forced into premature “poverty” retirement mainly because there will be few reasonably good jobs available to them.

Opportunistic downsizing, if it is allowed to go unchecked, will only exacerbate the coming Social Security crisis. By increasing the number of contingent workers, downsizing will create a greater drain on the Social Security system and will therefore contribute to the inadequate funding of the Social Security system. Delaying retirement and voluntary savings are currently the best means for avoiding the bankruptcy of the Social Security system. Downsizing makes these options even less likely, as more older downsized workers can no longer find gainful permanent employment. One way or another, the Social Security crisis must be addressed or the next generation of retirees will have to do without.

There is yet another “social cost” that will be incurred if opportunistic downsizing goes unregulated in the courts. As a result of opportunistic downsizing, aging workers can no longer expect to receive the rewards of hard work from a lifetime of devotion to a single employer. Job security based on efficient, long-term service is something that employees can no longer count on in the era of downsizing. Indeed, the more common experience today is that most workers can expect to be fired at least once during their employment career. The pending threat of being fired, especially when it occurs late in the employee’s career with a particular employer, can have a serious negative impact on other workers even if the downsized worker can find another job after being downsized. The threat of dismissal late in life can thus affect the way all workers think about their jobs. An employee who believes that he or she will be fired at some point may be less likely to

work as hard as an employee who believes that the job will remain secure so long as he or she works hard and is a "good employee."

As Schwab has noted, the reason for late-vesting pension benefits and seniority-based wages is to tell workers: "if you stick around, you will do well."²⁶⁰ If employees come to believe that it is just a matter of time before they too will be downsized because they have become too expensive, then they may decide that it just doesn't pay to work hard. Some employees may "shirk" on the job, working at a reduced level if they believe they may be downsized as they grow older. Downsizing of aging workers can therefore initiate a form of defensive opportunistic behavior practiced by employees who will no longer have an incentive to work hard during the beginning and middle periods of their job careers.²⁶¹

Because perfunctory performance is difficult for employers to monitor, employee shirking may be a serious cost of downsizing. Employee shirking is likely to be exacerbated if employees have reason to believe that their employer practices opportunistic downsizing.

When an employee is downsized for economic reasons, the employee's job security is not within the control of the employer. If a late-career older worker is opportunistically downsized, however, the employee's job security is within the control of the employer. If other workers see that the employer is targeting older workers for downsizing, then they will come to question the wisdom of working hard and investing in their own job training. Why invest in job-specific training if the job will be terminated once one becomes trained and has reached a wage scale that compensates for the cost of such training? Why work hard during early periods of employment when wages are likely to be low, if one will be downsized later when wages are high, especially when job-specific skills are not transferable to another employer? In order to minimize their own costs, employees who fear opportunistic downsizing may be less willing to be efficient on the job since the cost of working hard would not likely be rewarded with higher wages and benefits as they age on the job. While an employer's reputation for engaging in opportunistic downsizing may not deter future employees from seeking jobs with the employer when downsizing

260. Schwab, *supra* note 3, at 21.

261. Employee opportunism in long-term employment relations is greatest during mid-career because this is when employee shirking is likely to be the greatest. See Schwab, *supra* note 3, at 47-51. This is "[b]ecause the employer does not want to repeat recruiting and training costs with another employee, the incumbent [mid-career] employee has an opportunity to shirk without fear of dismissal." *Id.* at 47.

occurs,²⁶² a bad reputation for downsizing may discourage active workers from working as hard as they would if they believed that they would be treated fairly as they age.

Studies suggest that exposure to opportunistic downsizing in fact jeopardized the psychological well-being of workers, including their attitude towards work.²⁶³ Because unemployment can be hazardous to the workers' emotional health, the threat of being downsized on account of age and late-career employment can have negative consequences on the productivity of otherwise productive workers.²⁶⁴ Studies of managers in firms that have experienced layoffs suggest that the "survivors" suffer psychologically.²⁶⁵ "Many managers reported that layoffs have a decidedly negative effect on subordinates' productivity, morale and commitment to the organization."²⁶⁶

The threat of downsizing can also affect the degree to which workers will be willing to invest in their own job training. "Human capital theory predicts that workers' expected investment horizons are important determinants of the probability of receiving training."²⁶⁷ While this is likely to be the case with general downsizing, the adverse effect on job training will be heightened if career employees are threatened with opportunistic downsizing. Workers who have devoted a lifetime of service to their employers should not be fired prematurely at the end of their careers even if they are paid a wage which may exceed their current productivity. The wage of a late-career employee accounts for more than just that employee's current level of productivity; it also covers the employee's investment in the job measured in terms of years of service. To allow employers to downsize aging late-career employees who are nearing retirement sends a message to all workers that hard work and loyal service is not likely to be valued at the workplace. Workers will have less reason to adhere to the work ethic which has heretofore sustained America's standard of living.

262. See *supra* note 172 and accompanying text.

263. See William Darity, Jr. & Arthur H. Goldsmith, *Social Psychology, Unemployment and Macroeconomics*, 10 J. ECON. PERSPECTIVES 121, 121-22 (1996).

264. *Id.* at 124.

265. *Id.* at 124 (citing Joel Brockner, *Managing the Effects of Layoffs on Survivors*, 34 CAL. MGMT. REV. 9 (1992); Joel Brockner, *The Effects of Work Layoffs on Survivors: Research, Theory, and Practice*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 213-55 (Barry M. Staw & L. L. Cummings eds., 1988)).

266. *Id.*

267. Royalty, *supra* note 216, at 520. Royalty's study of data from the national Longitudinal Survey of Youth supports such a prediction. *Id.*

It is preferable, all things considered, to opt for incurring the increased costs of litigating opportunistic downsizing disputes in order to provide a more effective enforcement of the anti-discrimination principle embedded within the federal age and pension discrimination laws, since those principles are critical to maintaining a healthy and productive work ethic. It is bad legal and social policy to argue that the anti-discrimination provisions of federal age and pension law should be disregarded, minimized, or "judicially downsized." Because aging late-career employees are prime targets for opportunistic downsizing, and because the employer will have an economic incentive to target them for downsizing on the basis of their age and pension status, the courts should become more, not less, involved in the business of enforcing age and pension anti-discrimination in employment legislation.